IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No.

KENTUCKY RURAL ELECTRIC COOPERATIVE CORPORATION, Petitioner

vs.

MOLONEY ELECTRIC COMPANY, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PHILIP P. ARDERY

BROWN, ARDERY, TODD & DUDLEY

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IN THE

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No. _____

KENTUCKY RURAL ELECTRIC COOPERATIVE CORPORATION, - - - - - - *Petitioner,*

v.

MOLONEY ELECTRIC COMPANY, - - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners pray that a Writ of Certiorari issue so that this Court may review the judgment entered on September 14, 1960 in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW.

The opinion in this case of the United States District Court for the Western District of Kentucky is reported at 175 F. Supp. 250 (W. D. Ky. 1959) and may be found as Appendix A to this Petition.

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 282 F. 2d 481 (6th Cir. 1960) and may be found as Appendix B to this Petition.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was entered on the 14th day of September, 1960 and became final on the 3rd day of October, 1960. The jurisdiction of the Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. § 1254 (1) (1952).

QUESTIONS PRESENTED.

1. Whether a rural electric cooperative which operates as a distributor of transformers for an electrical equipment manufacturer and performs all of the functions of a distributor, such as sales promotion, warehousing, servicing, etc., may receive a commission for services rendered by the cooperative to the manufacturer in connection with the purchase of transformers from the manufacturer by the cooperative's members, without being in violation of § 2(c) of the Clayton Act.

2. Does § 4 of the Robinson-Patman Price Discrimination Act keep a true cooperative from infringing 2(c) where the action of the cooperative does not tend to lessen competition, restrain trade or create monopoly?

STATUTES INVOLVED.

1. Kentucky Revised Statutes, § 279.020:

"Any five or more natural persons, a majority of whom are citizens of Kentucky, may, by executing, filing and recording articles of incorporation as provided in KRS 279.030 and 279.040, form a nonprofit cooperative corporation for either of the following purposes:

(1) To promote and encourage the fullest possible use of electric energy in this state by making electric energy available by production, transmission, distribution or otherwise to persons in rural areas of the state at the lowest cost consistent with sound business methods and prudent management, and by making available to such person, at the lowest cost consistent with sound business methods and prudent management, electrical devices, equipment, wiring, appliances, fixtures and supplies, and all kinds of tools, equipment and machinery operated by electric energy.

(2) *To promote* and encourage the fullest possible use of electric energy in this state *by making* electric energy *available* to persons in rural areas of the state at the lowest cost consistent with sound business methods and prudent management by producing, transmitting, distributing or furnishing electric energy *to any corporation formed under this chapter* for the purposes provided by subsection (1) of this section and only to such corporation, and by making available to such corporations and only to such corporations, *electrical devices,* equipment, wiring, appliances, fixtures and

supplies, and all kinds of tools, equipment and machinery operated by electric energy, *and* accounting services, forms and supplies, bargaining services, business counsel and advice, engineering services, supervisory services, investment counsel, *general purchasing services of all kinds,* and any other services that are requested or deemed advisable or desirable in the conduct of its business by any corporation formed under this chapter for the purposes stated in subsection (1) of this section. Any corporation organized under this chapter may be organized to do any or all of the acts set forth in this subsection." (emphasis added).

2. Section 2(a) of the Clayton Act as amended by § 1(a) of the Robinson-Patman Price Discrimination Act, 38 Stat. 730, (1914), as amended, 49 Stat. 1526 (1936), 15 U. S. C. § 13(a) (1952):

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who

either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ."

3. Section 2(c) of the Clayton Act as amended by § 1(c) of the Robinson-Patman Price Discrimination Act, 38 Stat. 730 (1914), as amended, 49 Stat. 1526 (1936), 15 U. S. C. § 13(c) (1952):

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

4. Section 4 of the Robinson-Patman Price Discrimination Act, 49 Stat. 1528 (1936), 15 U. S. C. § 13b (1952):

> "Nothing in sections 13-13b, and 21a of this title shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association."

STATEMENT OF THE CASE.

The Appellant, Kentucky Rural Electric Cooperative Corporation, of Louisville, Kentucky, hereinafter called "KYRECC" is a corporation organized under Chapter 279 of the Kentucky Revised Statutes, the same being the Kentucky REA Enabling Act. This Act contemplates organization of rural electric cooperatives for the purpose of distribution and sale of electric energy to individuals. It also contemplates organization of cooperatives, whose members are other cooperatives, for the purposes of furnishing certain services to and procuring electrical equipment and supplies for the cooperative members.

The Appellee, Moloney Electric Company, hereinafter called "MOLONEY" is a manufacturer of electrical equipment and supplies whose official place of business is St. Louis, Missouri. (See Page 3a of the certified record filed herein. Similar parenthetical references hereinafter given are references to pages in the certified record.)

KYRECC was organized in 1943 to perform certain services provided for in the Kentucky REA Enabling Act, its members being some twenty-odd rural electric power distributors in Kentucky. In 1948 it began to act as distributor of electrical materials and equipment, selling primarily to its member cooperatives. (16a, 125a). In April of 1949, KYRECC and MOLONEY began business under an agreement whereby MOLONEY established KYRECC as its distributor to handle electric transformers, KYRECC selling these

transformers to rural electric distributors of electric power in Kentucky (3a, 4a) who were member cooperatives of KYRECC (125a).

KYRECC was approved as a distributor of MOLONEY transformers by the Rural Electrification Administration, and KYRECC in negotiating sales of MOLONEY transformers to its members did so in open competition and in competitive bidding with other manufacturers, suppliers and distributors as required by REA. (137a and 138a). Sometimes KYRECC would win the bidding for sales to its member cooperatives, and at other times it lost to other suppliers. (28a).

Among the services performed by KYRECC as a distributor of MOLONEY transformers were warehousing, shipping, insuring, repairing, performing promotional activities in connection with the sale of transformers, putting traveling salesmen on the road both separately and together with other MOLONEY salesmen, and assisting MOLONEY in the collection of accounts against KYRECC members (139a).

For these services KYRECC received from MOLONEY a normal distributor's commission which varied from 7½ to 10 per cent. (4a). Though it never paid any of these commissions to its members as patronage dividends, it did establish in its accounting records certain credits for the ultimate benefit of its patrons in proportion to the amount of purchases each patron made. (30a and 138a). The gross commissions paid by MOLONEY to KYRECC over the period of the contract amounted to approximately $367,000.00 and

the damages demanded in the complaint as amended were based upon the expectation of continuation of such commissions for a "reasonable time" had the contract not been broken. (81a).

Prior to October of 1955 KYRECC representatives had been warned by MOLONEY that MOLONEY was considering dropping KYRECC as a distributor of its transformers because of pressure from the private power companies. Then, on October 3, 1955, Mr. Milner Gray, a MOLONEY representative, appeared in Louisville before the board of directors of KYRECC to announce MOLONEY'S decision to cut off the supply of transformers to KYRECC. (8a, 9a). This, he said, was because of pressure from Moloney's larger customers, the power companies. (10a-12a).

After Gray's announcement, the relationship continued only for a brief period and amounted only to winding up the sale of transformers KYRECC still had on hand and allowing KYRECC to purchase spare parts for repair of the MOLONEY transformers previously sold. (9a). After being cut off as a distributor by MOLONEY, KYRECC made a number of attempts but was unable to negotiate any similar arrangement with any other manufacturer of desirable equipment and was, as a matter of fact, put out of business as a distributor of transformers (82a, 83a). KYRECC then initiated this triple damage action alleging MOLONEY discriminated against it as a distributor and destroyed its business in a manner prohibited by § 2(a) of the Clayton Act as amended by § 1(a) of the Robinson-Patman Price Discrimination Act, 38 Stat. 730

(1914) as amended, 49 Stat. 1526 (1936), 15 U. S. C. § 13(a) (1952).

At the time of the termination of the relationship there was no suggestion made by MOLONEY that the reason for its elimination of KYRECC was because of any illegality in the relationship between the two. In its first answer MOLONEY made no claim that the arrangement between the two was in anywise illegal under § 2(c) of the Clayton Act as amended by the Robinson-Patman Act. (See the original answer filed by MOLONEY, 13a, 14a).

After the filing of MOLONEY'S answer, KYRECC amended its complaint for the sole purpose of reducing the amount of damages claimed (89a). Thereafter in answer to the complaint as amended, for the first time MOLONEY alleged as a defense that the relationship was a violation of § 2(c) of the Clayton Act as amended by the Robinson-Patman Act (91a), and since the filing of that pleading has continued to urge that as the reason for its termination of business with KYRECC.

The District Court for the Western District of Kentucky entered summary judgment for MOLONEY, on the grounds that the paying or granting by MOLONEY to KYRECC and the receiving or accepting by KYRECC from MOLONEY of any commission upon the purchase by the member cooperatives of KYRECC of transformers and other equipment manufactured by MOLONEY was unlawful by reason of Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act, and that the agreement between MOLONEY

and KYRECC for the payment of such commission was illegal, unenforceable and void.

This judgment was affirmed by the Court of Appeals for the Sixth Circuit.

REASON FOR GRANTING THE WRIT.

The Court of Appeals for the Sixth Circuit Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled by This Court.

There may be many ways to interpret the decisions of the District Court and the Court of Appeals for the Sixth Circuit herein but uninterpreted they forbid the acquisition of any operating margin by any cooperative doing business in interstate commerce. Cooperatives survive by trading between their members on the one hand and the public in general on the other. Usually after a contribution by the members of a small amount of beginning capital, a cooperative continues in existence by using the margin of difference between the price which it pays for a product—in the case of a cooperative such as the one herein—and the price it sells that product for to its members. If on the other hand the cooperative is a selling or marketing cooperative such as the citrus growers cooperatives of the south, it accumulates margin from the difference paid by the purchasers of the processed product it sells and the amount it turns over to its members, the growers or producers. So whether a cooperative be purchasing for members or selling members' products on the public market, it obtains margin, usually small,

sometimes called a profit by those who oppose cooperatives. If the reasoning of the Court of Appeals for the Sixth Circuit is correct, all such transactions in interstate commerce are violations of 2(c) of the Clayton Act, because they constitute a buyer paying a seller's agent or vice versa. We do not believe this a proper application of the Act either from its obvious intention or from the literal carrying out of its specific language. We believe this is an important question of federal law which has not been but should be decided by this court.

In the beginning it may be well for us to say that we agree with a number of the cases that are cited in the opinion of the Sixth Circuit decision. We feel that the cooperative method of doing business is basically legitimate. We think cooperatives should be allowed to engage in business in the same fields as other corporations and that in so doing they should sustain the same responsibilities and receive the same protection of the law.

The Sixth Circuit Court opinion cites Maryland & Virginia Milk Producers Association, Inc. v. United States, 362 US 458, 4 L ed 2d 880, 80 S Ct 847 (1960). Here this court sustained an action brought by the United States charging a milk cooperative with monopoly. There was little doubt about the existence of the offense and the court held that the monopolizing cooperative could not insulate itself from its action by protection of § 6 of the Clayton Act (38 Stat. 731 (1914) as amended, 15 U. S. C. § 17) nor by §§ 1 and 2 of the

Capper-Volstead Act (42 Stat. 388 (1922), 7 U. S. C. § 291). The court in so holding says of these acts:

> "We believe it is reasonably clear from the very language of the Capper-Volstead Act, as it was in § 6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities." 362 US at—, 4 L ed at 887, 80 S Ct at—.

Though the defenses the milk producers cooperative sought to raise are not the same points of law in issue here, the same principle applies, for we are urging, in the spirit of the court as expressed by Mr. Justice Black in the cited case, that KYRECC be given the same burden of responsibility and the same competitive advantage as any other kind of corporation.

We agree that a cooperative has no more right to restrain trade than any other corporation. In addition to that, we also say that where a cooperative is not a true cooperative performing the proper function of a cooperative but is merely using the guise as a device for evading the law, or to gain economic power for illicit purposes, it is not entitled to the protection the law normally provides for cooperatives. Here we would note that in the case of Quality Bakers of America v. F.T.C., 114 F. 2d 393 (1st Cir. 1940), cited in the opinion of the Sixth Circuit in the case at bar, the Federal Trade Commission found the "cooperative" there involved was a fake designed for the purpose of

evading the law. The court said that the Quality Bakers Association ". . . is not a cooperative association within the meaning of section 4 of the Robinson-Patman Act, 15 U.S.C.A. § 13(b) . . ." 114 F. 2d at 397. On that basis we agree with the Quality Bakers case and with the frequent holdings that the privilege normally extended to cooperatives shall not be afforded cooperative schemes which are mere bookkeeping arrangements designed to evade the law. See Modern Marketing Service, Inc. v. F.T.C., 149 F. 2d 970 (7th Cir. 1945); Independent Grocers A. D. Co. v. F. T. C., 203 F. 2d 941 (7th Cir. 1953).

Very recently this court denied certiorari in a case where a group of buyers combined to obtain improper competitive advantage and the F.T.C. ordered them to cease and desist. The first corporation through which the combination operated was not a cooperative. A successor corporation purported to be a cooperative. American Motor Specialties Co., Inc. v. F.T.C., 278 F. 2d 225 (2d Cir. 1960), certiorari denied, 29 U.S.L. Week 3135 (U.S. Nov. 7, 1960.) This was a plain case of large buyers combining to get unfair advantage where Circuit Judge Waterman said:

> "Absent a cost justification for volume discounts, or a competitive situation not of the seller's own making, or other exceptions to the basic theory of the Section, a seller under Section 2(a) of the amended Clayton Act, 15 U.S.C.A. § 13(a) may not charge discriminating prices based upon the volume of the buyer's purchases." 278 F. 2d at 226.

In discussion of the effect of Section 4 of the Robinson-Patman Act, a point which will again be touched upon in later pages of this petition, the court says:

> "Fourth, petitioners contend that because the successor corporate buying group, Metropolitan Automotive Wholesalers Cooperative, Inc., was organized under the Cooperative Corporations Law of the State of New York, it was entitled to the protection of Section 4 of the Robinson-Patman Act, 15 U.S.C.A. § 13b. Quality Bakers of America v. F.T.C., 1 Cir., 1940, 114 F. 2d 393, 400, holds that Section 4 does not authorize cooperatives to accept brokerage fees forbidden by Section 2(c) even though these fees are passed on to the members. Section 4 states that nothing in the Robinson-Patman Act shall prevent a cooperative association from returning to its members, producers, or consumers any part of the association's earnings. Section 4 does not confer upon cooperative associations any blanket exemption from the Robinson-Patman Act. It only protects a cooperative association from charges of violating the Act premised upon the association's method of distributing earnings. See Farmers Cooperative Co. v. Birmingham, D.C.N.D. Iowa 1949, 86 F. Supp. 201, 230. The fact that earnings which result from illegal activity may be distributed to the association's members does not insulate the association from prosecution for the illegal activity. Clearly Section 4 does not permit a cooperative to violate Section 2(f) even though its savings through receipt of discriminatory prices are passed on to its members. Neither can Section 4 be said to prohibit imputing to the cooperative knowledge

possessed by its membership for purposes of establishing knowing receipt under Section 2(f). 278 F. 2d at 229.

Thus it appears to us the American Motor Specialties case turns on the proper point that the purported "cooperative" there received margins by obtaining a discriminatory price without any cost saving justification. We agree with this opinion.

In relation to the cases where activities are carried on improperly under the guise of a cooperative, we wish to note here that KYRECC was not organized to create monopoly, to restrain trade or to injure competition. It was organized under a specific enabling act of the Commonwealth of Kentucky which anticipated that the Rural Electric cooperatives of Kentucky would be small, thinly financed organizations and would find difficulty in purchasing materials on a basis reasonably equal to that of the private power companies. KYRECC within the purposes enumerated in the law performs many other functions than that simply of a distributor of MOLONEY transformers and as a distributor of electrical equipment. It publishes a magazine, it conducts a safety and job training program for its member cooperatives, does printing and central billing and performs various other services.

Moreover, KYRECC was not organized as an afterthought plan to evade antitrust law. It was in business for a number of years prior to becoming a distributor for MOLONEY. Its presence in the field brought one more bidder to the table and thus increased competi-

tion, and its demise as a distributor of transformers has reduced competition by one. There can be no comparison of the activities here to the activities of the so-called cooperatives in the above cited cases.

Here we invite this Court's attention to some comments in the opinion of the Court of Appeals such as that KYRECC ". . . is not an operating rural electric co-operative and does not generate, transmit or distribute electric energy. It is a so-called 'super co-operative' owned and controlled by twenty-two operating co-operatives." 282 F. 2d at 482. Certainly KYRECC considers itself to be an operating cooperative. This language of the Circuit Court was adopted from the brief for MOLONEY in the District Court, and reiterated by the Circuit Judge. KYRECC is only a "super co-operative" in the eyes of those who have succeeded in eliminating it as a distributor of transformers. This fact well demonstrates its inferiority in economic power to the forces aligned against it, the private power companies and Moloney Electric Company, which, acting in concert, removed it from the field of competition.

We urge this court to grant certiorari and in support of this position say that the language of § 2(c) of the Clayton Act that one party to a transaction cannot pay commission to the other party or the other party's agent "except for services rendered" needs re-evaluation by this Court. We further say that Section 4 of the Robinson-Patman Act was intended to provide protection for the exact situation as confronts us at bar.

Briefly we shall discuss these thoughts in the order stated.

As recently as June 1960, in the case of Federal Trade Commission v. Henry Broch and Company, 362 US 992, 4 L ed 2d 1124, 80 S Ct 1074, this court in a split decision noted that the decisions which have hitherto disallowed the "services rendered" language as a basis for justifying commissions have been criticized. Mr. Justice Douglas delivered the opinion of the court. In so doing and in reference to the case of Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, 106 F. 2d 667 (3rd Cir. 1939), he said:

> "Although that court's interpretation of the 'services rendered' exception in § 2(c) has been criticized, its conclusion that the price reduction was an allowance in lieu of brokerage within the meaning of § 2(c) has been followed and accepted.
>
> "We are asked to distinguish these precedents on the ground that there is no claim by the present buyer that the price reduction, concededly based in part on a saving to the seller of part of his regular brokerage cost on the particular sale, was justified by the elimination of services normally performed by the seller or his broker. There is no evidence that the buyer rendered any services to the seller or to the respondent nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge. *We would have quite a different case if there were such evidence and we need not explore the applicability of § 2(c) to such circumstances.* One thing is clear—the absence of such evidence and the absence of a claim that the rendition of

services or savings in distribution costs justified the allowance does not support the view that § 2(c) has not been violated." 362 US at—, 4 L ed 2d at 1130, 80 S Ct at—(Emphasis added).

In the case at bar KYRECC performed all the normal functions of a distributor. It warehoused, shipped, insured, put salesmen on the road, assisted MOLONEY in the collection of delinquent accounts against its own members. All of these were valuable services and effectuated the normal saving that a manufacturer experiences who does not act as his own distributor. Surely when the statute says that these commissions cannot be paid "except for services rendered" if this language is to have meaning at all it must have application to the facts here at hand. We think the emphasized language of the above cited case does so imply.

Further we say that it was the clear intention of Section 2 of the Clayton Act as amended by Section 4 of the Robinson-Patman Price Discrimination Act, 49 Stat. 1528 (1936), 15 U.S.C. § 13(b), to permit a cooperative to engage in business the way appellant did here. This section states that nothing in the Robinson-Patman Act prevents cooperatives from returning to members ". . . net earnings or surplus resulting from . . . trading operations, in proportion to their purchases or sales from, to, or through the association." Here we submit that the Court of Appeals misunderstands the basic consequences of its decision as indicated in the following language:

"We agree that it was the purpose of Section 4 to protect cooperatives in their competition with

corporate competitors. But this protection was specifically limited to the provision that a co-operative would not be in violation of the Act merely because of its structure as a co-operative with the distribution of its co-operative earnings among its members on a patronage basis. Under Section 4 such a distribution does not in and of itself constitute a violation of the Act, even though the act of returning profits to its members might technically be considered as constituting a discriminatory rebate or price discrimination in favor of its member purchasers and against its non-member purchasers. But that is as far as the exemption goes. If Congress intended to exempt co-operatives from the various anti-trust and price discrimination provisions of the Act, it could easily have said so. It did not do so. Section 4 deals only with the single act of a co-operative returning its profits to its members. *It does not exempt a co-operative in the acquisition of such profits in its business operations before they are distributed.*" 282 F. 2d at 485 (Emphasis added).

The Court of Appeals in effect is saying a cooperative is free to distribute margin in any way it wishes but it is not free to acquire that margin in the first place. If a cooperative may not acquire margin it certainly can distribute none. If it cannot acquire margin it cannot exist. Here we urge the test should be whether in the acquisition of its margin it tends to restrain trade, lessen competition or create monopoly. If the answer to this question is yes—as was the case in the American Motor Specialties case, the Quality Bakers case, the Maryland and Virginia Milk Pro-

ducers case and others—then the fact that it is a cooperative will not protect it.

But if its existence and operation increases competition and trade, and if it performs valuable services for the party paying the commission, as the facts at bar show, then the mere fact that it is a cooperative will not cause it to conflict with § 2(c).

The committee hearings and congressional reports available from the time of passage of the act throw considerable light upon the reasons for the existence of Section 4 and its provisions of exemption to cooperatives from Robinson-Patman Act requirements. In one of these hearings the following thoughts are expressed:

> "Section (f) [enacted as Section 4 of the 1936 Act] affirms the right of cooperatives to distribute their net earnings resulting from their trading operations among their members on a patronage basis in proportion to their purchases or sales from, to, or through such cooperative association. While the bill contains elsewhere no provision either express or implied to the contrary, *this section is added as a precautionary reservation in a spirit of encouragement to the cooperative movement.*" House Committee Report No. 2287, March 31, 1936, CCH Trade Regulation Reporter ¶ 3575.25. (Emphasis added.)

Another report states:

> "Whether functioning as buyers or sellers, cooperatives also share under the bill the guaranties of equal treatment and equal opportunity which it seeks to accord to trade and commerce generally."

Statement of Managers on part of House, Report No. 2951, June 8, 1936. CCH Trade Regulation Reporter ¶ 3575.26.

Further, 80 Congressional Record 9419, June 15, 1936 concerning H. R. 8442, CCH Trade Regulation Reports ¶ 3575.27, quotes Mr. Utterback of the House of Representatives as follows:

> "Section 4 represents another provision added to the bill in the fullness of caution to protect the distribution of cooperative earnings or surplus among their members on a patronage basis. In the dealings of cooperatives with others they share, of course, the protections and guaranties of the bill as to equal treatment and equal opportunity which it extends to producers, manufacturers, and merchants in trade and commerce generally. It leaves the members of cooperatives free to seek through cooperative endeavor the economies and savings of mass operations and assures to them, as compared with their larger corporate competitors, any real economies and savings to which those mass operations entitle them, and which they often now do not receive. There is nothing in the last section of the bill that distinguishes cooperatives, either favorably or unfavorably, from other agencies in the streams of production and trade, so far as concerns their dealings with others." CCH Trade Regulation Reporter ¶ 3575.27.

At another point the House Committee Report No. 2287, March 31, 1936 states:

> "There is nothing in [this bill] to penalize, shackle, or discourage efficiency, or to reward in-

efficiency. There is nothing in it to fix prices, or enable the fixation of prices; nor to limit the freedom of price movements in response to changing market conditions.

"Any physical economies that are to be found in mass buying and distribution whether by corporate chain, voluntary chain, mail-order house, department store, *or by the cooperative grouping of producers, wholesalers, retailers, or distributors—and whether those economies are from more orderly processes of manufacture, or from the elimination of unnecessary salesmen, unnecessary travel expense, unnecessary warehousing, unnecessary truck or other forms of delivery, or other such causes—none of them are in the remotest degree disturbed by this bill.*" House Committee Report Number 2287, Mar. 31, 1936. CCH Trade Regulation Reporter ¶ 3505.100. (Emphasis added.)

CONCLUSION.

The decision of the Court of Appeals herein if allowed to stand enables those who wish to restrict competition to eliminate cooperatives as effective competitors in interstate commerce. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY,
AT LOUISVILLE

Civil No. 3526

KENTUCKY RURAL ELECTRIC COOPERATIVE CORPORATION, - - - - - - - - *Plaintiff,*

v.

MOLONEY ELECTRIC COMPANY, - - - *Defendant.*

MEMORANDUM.

This suit was instituted January 6, 1958, by the Kentucky Rural Electric Cooperative Corporation, plaintiff, against Moloney Electric Company, defendant, seeking to recover three times the alleged damage of $367,000.00, or an aggregate of $1,101,021.00, plus reasonable attorney's fees, under the provisions of the Robinson-Patman Act, Sections 13, 13a 15 and 22, Title 15, United States Code.

The defendant is a manufacturer of electrical equipment and supplies. It is the contention of the plaintiff that it was a distributor, supplier, jobber and manufacturer's sales representative; that in April, 1949, plaintiff began business as a distributor of electrical transformers manufactured by the defendant, and from that date until October 15, 1955, was the distributor of transformers to rural electric cooperative corporations in Kentucky and as such sold approximately $4,000,000.00 worth of defendant's transformers, maintaining and operating warehousing fa-

cilities for defendant's products in Kentucky; that on October 15, 1955, pursuant to previous notice, defendant refused to accept further orders, and arbitrarily and without right terminated the previously existing arrangement; that such termination had the effect of lessening competition between distributors, suppliers, jobbers and manufacturer's sales representatives of electrical equipment, and tended to create a monopoly and to destroy and prevent competition; that this was an unlawful discrimination in favor of certain distributors, suppliers, jobbers and manufacturer's sales representatives in competition with plaintiff; that thereby the defendant has prevented plaintiff from obtaining similar electrical equipment and supplies on the same basis existing prior to October 15, 1955, and that plaintiff has thereby been damaged.

December 31, 1958, plaintiff filed its amended complaint, reducing the amount of damages sought to $472,666.20, three times the actual damage sustained alleged to have been $157,555.40.

The defendant, by its answer to the original and to the amended or substituted complaint, denied the material allegations of the complaint as amended and, by its Fifth Defense, alleged that all of the sales of defendant's equipment through the plaintiff were to rural electric cooperative corporations engaged in the business of generating and distributing electric energy; that 98.14 per cent of such sales were to rural electric cooperative corporations which owned the plaintiff corporation, and the remaining 1.86 per cent of the total sales were made to rural electric cooperative corporations which were entitled to share and participate in all of the profits of the plaintiff upon the basis of each of such distribution cooperatives' purchases of the products and services distributed and made available by the plaintiff; that the plaintiff was acting as agent and representative of both the member cooperatives and participat-

ing cooperatives, and that the member cooperatives were the owners of the plaintiff corporation which was subject to the direct and indirect control of the member cooperatives.

The defendant alleged that the paying or granting by the defendant to the plaintiff and the receiving or accepting by the plaintiff from the defendant of commission, brokerage or other compensation or discount upon the purchase by the member cooperatives and the participating cooperatives of transformers and other equipment manufactured by the defendant was unlawful by reason of the provisions of Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act, and that the agreement between the plaintiff and the defendant for the making of such payments, allowances, discounts or commissions was illegal, unenforceable, and void.

Two or more pre-trial conferences were had, discovery processes employed by counsel in the case and, on February 5, 1959, defendant filed its motion for a summary judgment. This motion has been briefed, and there is substantially no dispute between the parties as to the facts. As Judge Parker stated in the case of Oliver Bros., Inc., v. Federal Trade Commission, (CA 4) 102 F. 2d 763, 766, "* * * the controversy here is over the conclusions to be deduced from the facts rather than over the facts themselves; * * *"

The plaintiff, Kentucky Rural Electric Cooperative Corporation, is not an operating rural electric cooperative corporation; it does not generate, transmit or distribute electrical energy, but it is styled by counsel in this case a "super cooperative" owned and controlled by the operating cooperatives. In its by-laws, one of its recited purposes is to purchase materials, supplies and equipment for its members. The plaintiff, while acting as defendant's distributor, agent or broker, did not seek to obtain orders

from purchasers other than rural electric cooperative corporations. The complaint of the plaintiff here is that Moloney Electric Company, on and after October 15, 1955, refused to pay commission or discount upon sales of Moloney's equipment through the plaintiff to member and participating cooperatives.

Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, Section 13(c), Title 15, United States Code, provides:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

It is the contention of the defendant that under this statute it is unlawful for a seller to pay a commission, discount or brokerage to either (1) the buyer, or (2) an intermediary who is acting in fact for or in behalf of the buyer, or (3) an intermediary who is subject to the direct or indirect control of the buyer, and that the statute likewise makes the acceptance or receipt of any such commission, discount or compensation unlawful.

All of the member cooperatives owning the plaintiff corporation and the participating cooperatives at each year's end shared in the profits derived by the plaintiff from the commissions and discounts paid by the defendant

to plaintiff in proportion or on a basis of their respective purchases of Moloney's products.

The plan of operation consummating sales to member cooperatives during the period from April 1949 to October, 1955, was for the plaintiff to take from a member or participating cooperative an order for Moloney equipment and forward such order to Moloney at St. Louis. The ordered equipment was billed direct to the ordering cooperative at the usual or ordinary retail price, and the defendant Moloney would then forward the commission, brokerage or discount to the plaintiff. Moloney has not indicated an unwillingness to continue to sell its equipment to the member and participating cooperatives, but declines to pay to plaintiff the discount or brokerage as formerly done.

In Oliver Bros. v. Federal Trade Commission, supra, the following interpretation of Section 2(c) of the statute from the Report of the House and Senate Conference Committee is quoted on page 768:

> "'This subsection permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other.'"

And, on page 770 of the opinion, Judge Parker said:

> "* * * No one would contend that, without violating this section, a broker representing the seller could give his commissions to the buyer; * * * We

may assume that under the section it is permissible for a broker to render services to both buyer and seller and to receive from both compensation for the services rendered; but this is a very different thing from the buyer himself receiving the compensation."

In the case of Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, (CA 3) 106 F. 2d 667, 673, with respect to Section 2(c), the court said; "We • • • believe that paragraph (c) expresses an absolute prohibition of the payment of brokerage or compensation in lieu thereof to the buyer upon the buyer's own purchases." The court stated in that case that the question presented is simply whether or not the vendee may be compensated for services rendered by the vendee's agent acting as agent for the vendors, and said:

"We entertain no doubt that it was the intention of Congress to prevent dual representation by agents purporting to deal on behalf of both the buyer and seller. For this reason paragraph (c) is framed by disjunctives. The edge of the paragraph cuts two ways, prohibiting the payment or receipt of commissions, discounts or brokerage to the adversary party by the other's agent. • • • The agent cannot serve two masters, simultaneously rendering services in an arm's length transaction to both. • • • In short, a buying and selling service cannot be combined in one person."

In Biddle Purchasing Co. v. Federal Trade Commission, (CA 2) 96 F. 2d 687, 691, that court said:

"It is clear that the statute [referring to 2(c)] prohibits payments of brokerage by the seller to the buyer or his agent or representative or controlled intermediary except for services rendered."

• • • •

"Congress must have intended that payments by sellers should not be made to buyers through any one acting as agent for the buyer."

The intermediary or broker may not receive fees from the seller which he in fact turns over to the buyer. See also Webb-Crawford Co. v. Federal Trade Commission, (CA 5) 109 F. 2d 268; Quality Bakers of America v. Federal Trade Commission, (CA 1) 114 F. 2d 393; Jarrett v. Pittsburgh Plate Glass Co., (CA 5) 131 F. 2d 674; Fitch v. Ky.-Tenn. Light & Power Co., (CA 6) 139 F. 2d 12; Modern Marketing Service, Inc., v. Federal Trade Commission, (CA 7) 149 F. 2d 970; Federal Trade Commission v. Herzog, (CA 2) 150 F. 2d 450; Southgate Brokerage Co. v. Federal Trade Commission (CA 4) 150 F. 2d 607; Independent Grocers A. D. Co. v. Federal Trade Commission, (CA 7) 203 F. 2d 941.

Plaintiff's counsel seeks to avoid the teaching of the above cases as to the meaning of Section 2(c) by such cases as Bruce's Juices v. American Can Co., 330 U. S. 211; Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211; Moore v. Mead Service Co., (CA 10) 190 F. 2d 540; Noerr Motor Freight v. Eastern Railroad Presidents Conference, 155 F. Supp. 768.

The sole question decided in the case of Bruce's Juices, as stated by the Supreme Court, is whether notes given for purchases are unenforceable if the quantity discount plan violates the Act (Robinson-Patman Act). At page 750 of the opinion the Court said:

"The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the Act is made criminal and upon conviction a violator may be fined or imprisoned. • • • Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee."

However, on page 755, the Court continued:

> "This Court has held that where a suit is based upon an agreement to which both defendant and plaintiff are parties, and which has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought, the Court will entertain the defense that the contract in suit is illegal under the express provision of the statute. *Continental Wall Paper Co.* v. *Louis Voight and Sons Co.*, 212 U.S. 227."

On page 756 of the opinion in Bruce's Juices, supra, citing McMullen v. Hoffman, 174 U.S. 639, the Supreme Court said, "If, in order to prove his own case, a plaintiff proves his violation of law, then no court will aid the plaintiff to recover."

We think plaintiff's reliance upon the Kiefer-Stewart case, supra, is likewise unfounded. Kiefer-Stewart's suit against Seagram charged the latter with conspiracy with other distillers to maintain a fixed maximum retail price for liquor by selling only to wholesalers who agreed to maintain the fixed maximum retail price. Seagram's defense was that Kiefer-Stewart had entered into illegal agreements, fixing minimum retail prices, with other Indiana wholesalers. Hence, the suit was not between parties who had entered into the same illegal contract, the alleged breach of which constituted the gravemen of the suit. The Supreme Court held this defense unavailing.

Following the Kiefer-Stewart opinion, in the case of National Transformer Corp. v. France Mfg. Co., 215 F. 2d 343, 361, the Court of Appeals for the Sixth Circuit said:

> "It may be here emphasized that a contract which cannot be performed without violation of a statute is illegal and void. Where parties are in pari delicto, the law will leave them where it finds them, and all

> relief is refused because of the public interest. Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 51 S. Ct. 476, 75 L. Ed. 1112. The defendant may assert the invalidity of an agreement, even though he is a participator in the wrong. Standard Lumber Co. v. Butler Ice Co., 3 Cir., 146 F. 359. The defense of illegality is allowed, not as a protection to the defendant, but as a disability to the plaintiff."

See also Pennsylvania Water & P. Co. v. Consolidated G. E. L. & P. Co., (CA 4) 209 F. 2d 131.

Plaintiff also relies on the Supreme Court's opinion in Kelly v. Kosuga, 358 U.S. 516. The Kelly case was likewise a suit to recover the purchase price of commodities sold to it. The defense was sought to be made that the sale was pursuant to an agreement which violated the Sherman Antitrust Act. The Supreme Court, on page 518 of its opinion, said:

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act, has not met with much favor in this Court. This has been notably the case where the plea has been made by the purchaser in an action to recover from him the agreed price of goods sold."

The plaintiff here disavows any intent or purpose that its suit is based on a breach of contract. Conversely, it states that it is for a tort resulting from the violation of a statute. The answer to that contention seems obvious to this Court: if it be tort for the defendant to refuse to continue the transactions with the plaintiff, which by the terms of the statute are unlawful both as to plaintiff and defendant, then neither plaintiff nor defendant has a valid claim against the other arising out of the alleged tortious refusal to continue such transactions banned by the statute.

There being no substantial dispute as to the facts here involved, we believe the authorities referred to herein and cited by counsel in their briefs entitle the defendant to a summary judgment. Counsel for defendant will submit an appropriate judgment, upon notice to plaintiff's counsel, in accordance with the rules of this Court.

ROY M. SHELBOURNE,
United States District Judge.

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July 7, 1959

A Copy: Attest
Martin R. Glenn, Clerk,
By A. Rigsby, Deputy Clerk.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13992

Filed September 14, 1960.

KENTUCKY RURAL ELECTRIC COOPERATIVE CORPORATION,
Plaintiff-Appellant,

v.

MOLONEY ELECTRIC COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Kentucky.

Decided September 14, 1960

Before: Miller and Cecil, Circuit Judges, and Holland, Senior District Judge.

Miller, Circuit Judge. The appellant, Kentucky Rural Electric Cooperative Corporation, hereinafter referred to as KYRECC, brought this action against the appellee, Moloney Electric Company, hereinafter referred to as Moloney, to recover triple damages in the amount of $472,666.20 under the provisions of the Robinson-Patman Act, Sections 13, 13a, 15 and 22, Title 15, U. S. Code.

KYRECC is a Rural Electric Co-operative Corporation incorporated under the Kentucky statutes. It is not an operating rural electric co-operative and does not generate, transmit or distribute electric energy. It is a so-called "super co-operative," owned and controlled by twenty-two operating co-operatives. Among the purposes recited in its

bylaws is to "purchase materials, supplies and equipment for its members," the co-operatives.

Moloney manufactures electrical equipment and supplies.

Beginning in 1949, KYRECC started handling transformers and a few other items of equipment manufactured by Moloney. It would take from a co-operative an order for Moloney equipment and send the order to Moloney in St. Louis. Moloney would bill the co-operative the ordinary price for the equipment and send to KYRECC its commission on the sale. During the period 1949 to October 15, 1955, Moloney paid to KYRECC a commission between 7½% and 10% upon all sales of Moloney equipment effected through KYRECC. During this period KYRECC did not make any sale to any customer or purchaser other than the co-operatives.

In October, 1955, Moloney notified KYRECC that it would thereafter not pay to KYRECC such commissions on orders placed subsequent to October 15, 1955, and in accordance with such notice has since October 15, 1955, refused to pay any commissions to the appellant.

KYRECC's complaint alleged that Moloney's refusal to accept further orders and its arbitrary termination of the previously existing arrangement had the effect of lessening competition between distributors and manufacturer's sales representatives of electrical equipment, that it tended to create a monopoly and destroy and prevent competition, and was unlawful discrimination in favor of certain distributors, suppliers, jobbers and manufacturer's sales representatives in competition with KYRECC, by reason of which KYRECC had suffered damage in the amount of $157,555.40.

Moloney contends that with respect to the purchase by the distribution co-operatives, through KYRECC, of transformers and equipment manufactured by Moloney,

KYRECC was an agent and representative of, and was acting in fact for and in behalf of both the member co-operatives, who were owners of KYRECC, and the participating co-operatives, and that the payment by Moloney to KYRECC and the acceptance by KYRECC from Moloney of anything of value as a commission upon the purchase through KYRECC of transformers and other equipment manufactured by it was unlawful by reason of provisions of Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, Section 13(c), Title 15, U. S. Code. For that reason it claims it was legally required to terminate the payment of such commissions and that its action in refusing to do an illegal act did not subject it to liability.

Section 2(c) of the Clayton Act, as amended, provides as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

The facts are not in dispute and were established by the testimony of the executive manager of KYRECC, its articles of incorporation, bylaws, and other exhibits. Moloney's motion for summary judgment was sustained by the District Judge, from which ruling this appeal was taken.

There is no merit in KYRECC's complaint that it was error for the District Judge to dispose of the case on a motion for summary judgment. The undisputed facts presented pure questions of law, and KYRECC was afforded full opportunity to be heard on the legal issues presented by the pleadings. Feldman v. Miller, 220 F. 2d 826, C. A. D. C. Even though the issue be a difficult one, if it is purely legal and not factual, summary judgment is proper. Morr v. United States, 243 F. 2d 913, 914, C. A. 6th.

In support of this ruling, the District Judge filed a memorandum opinion, which is reported at Kentucky Electric Cooperative Corporation v. Moloney Electric Company, 175 F. Supp. 250. For the reasons given and the authorities cited therein, to which reference is made, we are of the opinion that the commissions paid by Moloney to KYRECC were in violation of the Act. We see no logical escape under the facts of this case from the conclusion that such payments were by the seller to an intermediary in the transaction, where such intermediary was acting in fact for or in behalf or was subject to the direct or indirect control, of a party to the transaction other than the person by whom such commission was paid.

Other questions are, however, presented by this appeal.

Appellant contends that although the receipt of such commissions by KYRECC may have been illegal under the Act, such illegal act is not a defense to liability on the part of Moloney in an action brought by KYRECC against Moloney for its violation of other provisions of the Robinson-Patman Act, as alleged by the complaint in this action. Reliance is placed upon Bruce's Juices, Inc. v. American Can Co., 330 U. S. 743; Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U. S. 211; Kelly v. Kosuga, 358 U. S. 516. We recently considered this question in Tampa Electric Co. v. Nashville Coal Co., et al., 276 F. 2d 766, 773-774, C. A. 6th. As there pointed out, under the Supreme

Court cases above referred to, a defendant who has engaged in transactions which are illegal under the anti-trust laws is not entitled to protection in a controversy arising out of such transactions merely because the plaintiff has also engaged in transactions illegal under the anti-trust laws. But if the judgment sought by the plaintiff requires the defendant to do that which is illegal under the Act, the Court will not require him to do so, not because of the illegality of the plaintiff's conduct, but because public policy forbids a decree directing defendant to violate the restraints provided by the Act. Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U. S. 227, 262. We think it necessarily follows that the Court will not adjudge liability against a defendant for refusing to do that which the Act makes it illegal for him to do. Since the payment of commissions to appellant was illegal under the Act, the District Judge was correct in ruling that no cause of action arose in favor of appellant upon appellee's refusal to make the illegal payments. As pointed out by the District Judge, the present action is not for breach of contract but for damages for violation of the anti-trust laws, and that Moloney has not refused to sell its equipment to the member and participating co-operatives, but has only declined to pay appellant a commission on such sales.

Appellant finally contends that by reason of Section 4 of the Clayton Act as amended by the Robinson-Patman Act, Section 13b, Title 15, U. S. Code, KYRECC is exempt from the provisions of Section 2(c) of the Act under the facts of this case. Section 4 provides as follows:

> "Nothing in sections 13-13b, and 21a of this title shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sale from, to, or through the association."

Appellant argues that essentially every co-operative's function is to either purchase materials, supplies or services at a discount, and pass them on to its members, or else to sell materials, supplies or services of its members to third parties, receiving from the third parties what in essence is a brokerage or commission, and that it was the purpose of Section 4 to protect such well established and recognized practices.

We agree that it was the purpose of Section 4 to protect co-operatives in their competition with corporate competitors. But this protection was specifically limited to the provision that a co-operative would not be in violation of the Act merely because of its structure as a co-operative with the distribution of its co-operative earnings among its members on a patronage basis. Under Section 4 such a distribution does not in and of itself constitute a violation of the Act, even though the act of returning profits to its members might technically be considered as constituting a discriminatory rebate or price discrimination in favor of its member purchasers and against its non-member purchasers. But that is as far as the exemption goes. If Congress intended to exempt co-operatives from the various anti-trust and price discrimination provisions of the Act, it could easily have said so. I did not do so. Section 4 deals only with the single act of a co-operative returning its profits to its members. It does not exempt a co-operative in the acquisition of such profits in its business operations before they are distributed. Quality Bakers of America v. Federal Trade Commission, 114 F. 2d 393, 399-400, C. A. 1st. Compare: Maryland and Virginia Milk Producers Association, Inc. v. United States, 362 U. S. 458, 464-466. Appellant has referred us to no authority to the contrary.

The judgment is affirmed.

FIL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 575

KENTUCKY RURAL ELECTRIC COOPERATIVE CORPORATION, *Petitioner.*

versus

MOLONEY ELECTRIC COMPANY, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 575

KENTUCKY RURAL ELECTRIC COOPERATIVE CORPORATION, - - - *Petitioner,*

versus

MOLONEY ELECTRIC COMPANY, - *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

APPLICABLE STATUTES.

Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act, 15 U. S. C. § 13(c):

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is

acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

Section 4 of the Robinson-Patman Act, 15 U. S. C. § 13b:

"Nothing in sections 13-13b [§§ 2-4 of the Act] and 21a of this title shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association."

THE QUESTIONS PRESENTED.[1]

I.

Under § 2(c) of the Act, can an intermediary (Ky. RECC), owned and controlled by a group of buyers and in fact the agent of the buyers (the coops), perform services for the seller (Moloney)—including particularly the brokerage function or "selling service"—so as to make it lawful for the seller to pay a sales commission or brokerage to the intermediary?

II.

Is a group purchasing agent which is cooperatively owned and controlled by a group of buyers exempt from the provisions of § 2(c)?

[1]The petitioner, Kentucky Rural Electric Cooperative Corporation, is called Ky. RECC; the respondent, Moloney Electric Company, is called Moloney; the distribution rural electric cooperatives which own and control Ky. RECC are called coops.

III.

Is it necessary to a violation of § 2(c) that the payment of brokerage be shown in the particular case to have substantially lessened competition or tended to create a monopoly?

STATEMENT OF THE CASE.

The Statement of the Case contained in Ky. RECC's Petition seeking the writ omits mention of the principal facts upon which the District and Circuit Courts entered and affirmed the summary judgment for Moloney.

Ky. RECC is not an operating rural electric cooperative; it does not generate, transmit or distribute electric energy. It is a "super coop," owned and controlled by 22 operating coops.

A principal purpose for which it was created, as recited in its By-laws,[1] is to "purchase materials, supplies and equipment for its members," the coops.

Moloney manufactures electrical equipment and supplies.

Beginning in 1949, Ky. RECC started handling transformers and a few other items of equipment manufactured by Moloney. Although it handled Moloney equipment from the Spring of 1949 until October 1955, during this entire six-year period Ky. RECC did not make a single sale to any customer or purchaser other than the coops.[2]

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[1] R 104. References to the Record filed by Ky. RECC are cited in this manner, the "a" following each page number being omitted.

[2] R 125.

During this period 1949 to October 1955, Moloney paid to Ky. RECC a commission, which over the period increased from 7½% to 10%,[1] upon sales of Moloney equipment to the coops, this being the same commission which Moloney paid to ordinary independent distributors of its equipment.[2] As noted by the Circuit Court,[3] Ky. RECC would take from a coop an order for Moloney equipment and send the order to Moloney in St. Louis. Moloney would bill the coop the ordinary price for the equipment and send to Ky. RECC its commission on the sale.

In October 1955, Moloney notified Ky. RECC that Moloney thenceforth would not pay to Ky. RECC such commissions upon sales to the coops; and, in this action, Ky. RECC seeks damages for Moloney's refusal to pay further commissions upon such sales.

Except for the fact that the coops own Ky. RECC and thus would receive any further commissions paid to it, the coops have not been damaged by any act of Moloney. From 1949 to 1955, the coops purchased Moloney equipment at ordinary retail prices. As stressed by both the District[4] and Circuit[5] Courts, the coops still can buy Moloney equipment at the same prices.[6] But Moloney will not pay to Ky. RECC a commission upon such sales.

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[1] R 58.
[2] R 4, 61-2.
[3] 282 F.2d at 483.
[4] 175 F. Supp. at 253.
[5] 282 F.2d at 484.
[6] R 144.

The question in the case, therefore, is whether or not Ky. RECC can recover damages from Moloney because of Moloney's refusal to pay to Ky. RECC commissions upon sales of Moloney equipment to the coops which own and control Ky. RECC.

Section 2(c) of the Clayton Act, as set out on Page 1 above, makes it unlawful, in a transaction of purchase and sale, for the buyer, or an intermediary or broker who is subject to the direct or indirect control of the buyer or who is acting in fact for the buyer, to receive a commission or brokerage from the seller. The statute also makes it an unlawful act for the seller to pay such a commission or brokerage.

Upon thirteen occasions, this statute has been before the Courts of Appeal for seven of the circuits.[1] It has once been before this Court,[2] and this Court denied certiorari in the *Biddle, A. & P., Webb-Crawford* and *Southgate Brokerage* cases, a rehearing also having been denied in the *A. & P.* case.

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[1]The decisions, in the order in which rendered, are as follows: *Biddle Purchasing Co.* v. *F.T.C.*, 96 F.2d 687 (2d Cir.), cert. den., 305 U. S. 634, 83 L. Ed. 407; *Oliver Bros., Inc.* v. *F.T.C.*, 102 F.2d 763 (4th. Cir.); *Great Atlantic & Pac. Tea Co.* v. *F.T.C.*, 106 F.2d 667 (3d Cir.), cert. den., 308 U. S. 625, 84 L. Ed. 521; *Webb-Crawford Co.* v. *F.T.C.*, 109 F.2d 268 (5th Cir.), cert. den., 310 U. S. 638, 84 L. Ed. 1406; *Quality Bakers of America* v. *F.T.C.*, 114 F.2d 393 (1st Cir.); *Jarrett* v. *Pittsburgh Plate Glass Co.*, 131 F.2d 674 (5th Cir.); *Fitch* v. *Ky.-Tenn. Lt. & Pwr. Co.*, 136 F.2d 12 (6th Cir.); *Modern Marketing Service, Inc.* v. *F.T.C.*, 149 F.2d 970 (7th Cir.); *F.T.C.* v. *Herzog*, 150 F.2d 450 (2d Cir.); *Southgate Brokerage Co.* v. *F.T.C.*, 150 F.2d 607 (4th Cir.), cert. den., 326 U. S. 774, 90 L. Ed. 468; *Independent Grocers Alliance Distributing Co.* v. *F.T.C.*, 203 F.2d 941 (7th Cir.); *Henry Broch & Co.* v. *F.T.C.*, 261 F.2d 725 (7th Cir.), rev'd, 363 U. S. 166, 4 L. Ed.2d 1124; *Robinson* v. *Stanley Home Products, Inc.*, 272 F.2d 601 (1st Cir.).

[2]*F.T.C.* v. *Henry Broch & Co.*, 363 U. S. 166, 4 L. Ed.2d 1124.

These decisions recognize and establish that § 2(c) makes unlawful the payment by a seller of a commission, brokerage or other compensation, or discount in lieu thereof, to *either* **(1)** the buyer *or* **(2)** an intermediary subject to the direct or indirect control of the buyer *or* **(3)** an intermediary who in fact is the buyer's agent.

As held in this case by the District and Circuit Courts, on the undisputed facts—established by Ky. RECC's own corporate records and the testimony of its own Manager—§ 2(c) is squarely applicable and makes unlawful the payment of any commission to Ky. RECC upon sales to the coops.

In essence, Ky. RECC was "the other party," or buyer, in sales of Moloney equipment to the coops. Ky. RECC is the alter ego of the coops.

Ky. RECC does not have any capital stock.[1] Its member coops own it equally and in the event of liquidation would share equally in its assets.[2] These coops are the only persons or organizations sharing in any respect in the ownership of Ky. RECC.[3]

Thus, contrary to the prohibition of § 2(c), any commission paid by Moloney to Ky. RECC on sales to the coops would be in reality paid to "the other party" to the transactions, the purchasing coops.

The second category of intermediary or broker, which cannot lawfully be paid a commission by the

[1] R 97.
[2] R 17.
[3] R 20.

seller, is one "subject to the direct or indirect control" of the buyer. Ky. RECC is undeniably subject in every respect to the very direct control of the coops.

Under Article V of Ky. RECC's Articles of Incorporation, the number of its Directors is equal to the number of member coops, and each member coop names one Director.[1] Under Ky. RECC's By-laws, "the business and affairs of the Cooperative shall be managed by" such Board of Directors.[2] The By-laws further provide that the officers of Ky. RECC shall be elected by "and from" the Board,[3] so that Ky. RECC's officers necessarily are among the individuals placed upon its Board of Directors by the member coops.

Ky. RECC's Manager admitted in deposition that at all times its Directors have been either Managers or Directors of the member coops,[4] that the policies of Ky. RECC are determined by its Directors,[5] and that the Directors have discretion with respect to distribution or use to be made of Ky. RECC's profit.[6]

No one in the case has bothered to even suggest that Ky. RECC has not at all times been subject to the direct control of the coops. In fact, the control which the coops have over Ky. RECC is much more direct, well-defined and absolute than the control exercised by the buyers over the brokers involved in any of the decided cases in which § 2(c) was held to pro-

[1] R 96.
[2] R 109.
[3] R 113.
[4] R 23.
[5] R 24.
[6] R 24, 30.

hibit payment by the seller of a commission to a broker subject to the control of the buyer.[1]

Ky. RECC does not base a direct argument on the fact that it has not paid over to its members the commissions paid to it by Moloney, but it always notes such fact. The fact has no significance whatever.

In the first place, if these commissions or any other "margin" or profit is retained by Ky. RECC and converted into assets, the member coops *own* the assets and could have them distributed to themselves if they wished. Also, whether any such commissions or "margin" was to be retained by Ky. RECC or was to be distributed among the coops has at all times been entirely within the control of the coops, themselves. Ky. RECC's Manager testified that the Directors appointed by the coops make the determination as to distribution or use to be made of Ky. RECC's profit,[2] and this fact is specified in Ky. RECC's By-laws.[3]

Where a buyer has absolute control over whether the broker will retain commissions or distribute the commissions to the buyer, it would not make sense to say that § 2(c) is violated where the buyer elects to receive the commissions but is not violated where, for its own purposes, the buyer elects to have its wholly-owned broker retain the commissions.

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[1] E. g., *Quality Bakers of America* v. *F. T. C.*, 114 F.2d 393; *Great Atlantic & Pac. Tea Co.* v. *F. T. C.*, 106 F.2d 667; *Modern Marketing Service* v. *F. T. C.*, 149 F.2d 970.

[2] R 24.

[3] R 117-18.

Reliance upon argument is not necessary, however. In the *Biddle* and *Oliver Bros.* cases, the brokers passed the commissions on to the buyers. Section 2(c) was held to have been violated. In the *Quality Bakers* case, one-half of a particular commission was credited to the stockholder whose order produced the commission and the other one-half was used for expenses or dividends as determined by the Directors. Section 2(c) was held to have been violated. In the *Webb-Crawford* and *Fitch* cases, the brokers retained all of the commissions. Section 2(c) was held to have been violated.

Thus, where the broker occupies any of the specified relationships to the buyer, the seller's payment of a commission to the broker is outlawed by § 2(c) whether the broker retains all of the commissions, pays all of the commissions to the buyer, or retains part of them and pays part to the buyer. It is the receipt of the commissions which is made unlawful, and it is immaterial to the violation what the broker thereafter does with them.

The third category of payment by a seller prohibited by § 2(c) is a payment to an intermediary who is acting in fact for or in behalf of the buyer. It is equally clear that, in the transactions in question, Ky. RECC was acting as a purchasing agent of the coops.

In Ky. RECC's By-laws, one of its purposes is stated to be to "purchase materials, supplies and equipment for its members," the same By-law providing that "any savings resulting from such purchasing

shall from time to time and at the direction of the Board of Directors, be paid to the member cooperatives as patronage dividends."[1]

In a pamphlet or "Prospectus" of rural electrification in Kentucky prepared by Ky. RECC, Ky. RECC described itself as having been formed to act as a cooperative "representing the individual cooperatives in such matters as * * * Group procurement of materials and supplies for the cooperatives."[2]

It is firmly established in the decisions that § 2(c) prohibits payment by a seller of commissions to an intermediary who in fact is the agent of the buyer.[3] As with respect to the matter of control, the agency relationship between Ky. RECC and the coops in this case is infinitely clearer than were the agency relationships in the decided cases in which the payment of commissions by the seller to the buyer's broker was held unlawful.

It is worth noting that the circumstances which will make the intermediary ineligible for the receipt of commissions are in the alternative. He cannot receive commissions from the seller if he *either* is subject to the buyer's control *or* is the buyer's agent. Thus, in the *Biddle* and *Oliver Bros.* cases, the intermediaries were independent corporations and were *not* controlled by or affiliated with either the buyers or the

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[1] R 104.

[2] R 130.

[3] E. g., *Biddle Purchasing Co.* v. *F. T. C.*, 96 F.2d 687; *Oliver Bros., Inc.* v. *F. T. C.*, 102 F.2d 763; *Webb-Crawford Co.* v. *F. T. C.*, 109 F.2d 268.

sellers through stock or other ownership. Despite such lack of control by the buyers, the Second and Fourth Circuits held that the intermediaries were the agents and representatives of the buyers and that § 2(c) thus made it unlawful for them to be paid commissions by the sellers.

The foregoing discussion of facts and brief reference to decisions has been included in this Statement of the Case, rather than in the Argument hereafter, for the reason that, thus far, there is no dispute between the parties, but it is nonetheless necessary to emphasize how squarely this case falls within the prohibitions of § 2(c). As stated by the Circuit Court after a review of the facts:[1]

> "We see no logical escape under the facts of this case from the conclusion that such payments were by the seller to an intermediary in the transaction, where such intermediary was acting in fact for or in behalf, *or* was subject to the direct or indirect control, of a party to the transaction other than the person by whom such commission was paid." (Court's italics.)

While not disputing in its Petition herein any of the foregoing matters, Ky. RECC seeks to avoid their effect by three arguments, hereafter discussed, none of which has any validity and each of which has been repeatedly and uniformly rejected by the Courts of Appeal.

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[1] 282 F.2d at 484.

SUMMARY OF ARGUMENT.

I. The only basis on which Ky. RECC seeks certiorari is the erroneous contention that the uniform decisions of the Courts of Appeal are not sound.

II. Ky. RECC insists that it may lawfully receive from Moloney a normal distributor's commission for the alleged service of "selling" Moloney products to Ky. RECC's own members. The Courts uniformly hold that, as a matter of law, the buyer's own broker cannot be paid commissions by the seller for the alleged service of "selling" the buyer.

III. The Courts and the Trade Commission consistently hold that cooperatively-owned group purchasing agents are not exempt from § 2(c). A contrary holding would utterly destroy § 2(c) as an effective preventive of abuse of the brokerage function under the coercive influence of mass buying power.

IV. Section 2(c) absolutely prohibits the payment of brokerage in the described instances, and it is not necessary to a violation that the payment be shown in the particular case to have had the effect of lessening competition or tending to create a monopoly.

ARGUMENT.

FIRST POINT.

THE ONLY ARGUMENT ADVANCED BY KY. RECC, AS A BASIS FOR GRANT OF THE WRIT, IS THAT THE REPEATED AND UNIFORM DECISIONS OF THE COURTS OF APPEAL ARE UNSOUND.

This case does not present a single novel issue or even argument. Every argument advanced by Ky. RECC has been repeatedly and consistently decided, adversely to Ky. RECC's position, in numerous decisions of the Courts of Appeal. In fact, these issues have been often resolved with almost singular unanimity among the Circuit Courts.

In *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393, 67 L. Ed. 712, 714, the Court, in discussing exercise of its discretion to grant certiorari, stated the following:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

In like manner, this case "certainly comes under neither head."

In its Rule 19, this Court has stated that certiorari will be granted "only where there are special and important reasons therefor," and has provided illustrations of appropriate bases for the writ. With reference to the Rule, there is no suggestion in this case that the Sixth Circuit departed from the usual course of judicial proceedings, or decided any question in a manner inconsistent with decisions of this Court or decisions of the other Courts of Appeal; nor does this case present a novel question which has not been, but should be, settled by this Court.

As discussed, the facts of the case bring it so squarely within the language and legislative purpose of § 2(c) that the conclusion is inescapable that § 2(c) prohibits the payment of commissions to Ky. RECC on sales to the coops. This is a simple case of the "dummy broker," condemned alike in the majority and dissenting opinions of this Court in the very recent *Henry Broch* case. Ky. RECC seeks to avoid this conclusion by resort to three arguments hereafter discussed. Each of these arguments, however, has been carefully considered by other of the Circuit Courts, as well as the Sixth Circuit, and been repeatedly rejected in thoughtful opinions.

Ky. RECC's position therefore—and the only basis on which it asks this Court to grant the writ—is that these numerous and uniform decisions of the Courts of Appeal are not sound. Even if this were so, and it decidedly is not, the argument is not a basis upon which this Court will grant the writ and review the reasoning unanimously followed and conclusions unanimously reached by the Circuit Courts.

SECOND POINT.

A BROKER WHICH IS OWNED AND CONTROLLED BY A SMALL GROUP OF BUYERS AND IS THE AGENT OF THE BUYERS CANNOT PERFORM SERVICES FOR THE SELLER SO AS TO PERMIT THE BROKER TO RECEIVE BROKERAGE—AN ORDINARY DISTRIBUTOR'S OR DEALER'S COMMISSION—FROM THE SELLER.

Although Ky. RECC acknowledges in its By-laws,[1] in its present Petition before the Court (p. 6) and in its Prospectus of Rural Electrification[2] that it was organized to act as a purchasing agent for the coops, it nonetheless says that it performed certain services for Moloney which, despite the provisions of § 2(c), entitled Ky. RECC to receive sales commissions from Moloney. Before examining the authorities, it is necessary to consider the particular services, and the kind of compensation or commission, Ky. RECC is talking about.

As to the services, Ky. RECC says that it warehoused and shipped some of the transformers (although when this was done Moloney paid both the freight to Ky. RECC and the additional freight from Ky. RECC to the purchasing coop),[3] that it repaired some of the transformers, and that it occasionally assisted Moloney in collecting from several of the coops which once in a while were a little slow in paying.[4]

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[1] R 104.
[2] R 130.
[3] R 7-8.
[4] R 87.

Ky. RECC was hard pressed to name these "services," but in any event these are not the ones it emphasizes—and they are not the ones the lawsuit is about. Ky. RECC is not trying to establish its right to reasonable compensation for warehousing a few transformers, occasionally assisting in collecting delinquent accounts, etc. **It seeks to establish its right to receive a full distributor's or dealer's commission upon sales to the coops which own and control it.**

Always when discussing the services it says it performed, the service which Ky. RECC emphasizes is what we would call the "selling service." Thus, its Manager repeatedly stressed Ky. RECC's "sales promotion" efforts for Moloney and "general promotion" of Moloney products.[1] He often referred to the service Ky. RECC performed in "negotiating sales" of Moloney equipment.[2] In its present Petition (p. 7), Ky. RECC again emphasizes its "promotional activities in connection with the sale of transformers."

Ky. RECC argued frankly in its Brief in the Sixth Circuit that, despite its relationship to the coops and despite the provisions of § 2(c), Ky. RECC can lawfully act as a dealer or distributor of Moloney products and be paid by Moloney an ordinary dealer's or distributor's commission *for the service of selling Moloney products to the coops.* Throughout its Complaint in the action, Ky. RECC refers to itself as a "distributor" of Moloney equipment and as Moloney's "sales representative."[3] Ky. RECC's Manager also spoke in

[1] R 10, 139.
[2] R 7, 8.
[3] *E. g.*, R 3, 6.

these terms.[1] In its Brief in the Sixth Circuit (p. 17), Ky. RECC described itself as "Moloney's dealer."

Again with respect to "services," Ky. RECC has always insisted, as it does in its present Petition (p. 18), that it "performed all the normal functions of a distributor"; or, as it said in its Sixth Circuit Brief (p. 3), "performed all of the functions of a properly qualified and normally operating manufacturer's dealer." Its Manager testified in the same vein: "We are a distributor and operate as any distributor, performing the same services of any distributor * * *."[2] *The principal service performed by an ordinary, independent distributor of course is the selling service.*

Ky. RECC's claim that it performed all of the functions of a normal distributor, including the selling service, is completely destroyed by the fact that, during the entire six years it handled Moloney equipment, *it did not make a single sale to a customer other than one of the coops.*

In the face of this fact, Ky. RECC nonetheless continues to assert that the principal service it performed for Moloney was the selling service. In its present Petition (p. 7), it says it "negotiated sales" of Moloney transformers to the member coops "in open competition" with other suppliers and distributors of equipment. Throughout its Sixth Circuit Brief (pp. 2, 5, 19), it reiterated this assertion that it acted as Moloney's sales representative "meeting free com-

[1] R 7, 28, 137, 139.
[2] R 61.

petition in the marketing of transformers to rural electric cooperatives," and engaging before its own members "in open competition for business." As a matter of fact, at one point in its Sixth Circuit Brief (p. 18), Ky. RECC stated the whole 2(c) question in the case in these terms, as follows:

> "The question then arises as to whether or not it is legally possible for KYRECC to act in such transactions as these as a manufacturer's dealer *competing in the open market as it did for business with its own members.*"[1]

Just how "free" and "open" this competition really was is revealed by a letter written to Moloney, just after Moloney announced that it would not thereafter pay commissions to Ky. RECC on sales to the coops, by a Director of Ky. RECC who was also Manager of one of the member coops. The following passages are exemplary of the whole letter:[2]

> "You have offered to continue to deliver transformers to my cooperative directly from your factory. I might say that this is a nice offer, but do you intend to give me the discount that would have been profit to K.R.E.C.C.? It may be that you should understand how K.R.E.C.C. is connected with the cooperatives of Kentucky. My cooperative, Big Sandy R.E.C.C., is a member of Kentucky R.E.C.C., which is an association of all the cooperatives. We, the distribution cooperatives, own Kentucky R.E.C.C. and further, we

[1]Unless otherwise stated, emphasis wherever appearing has been added.

[2]R 133-5.

think that through this agency we have been able to obtain satisfactory delivery on orders purchased. Through failure to do business with our own organization, you are failing to do business with us. Therefore, I do not think that you can expect orders directly from the distribution cooperatives and by-pass our own organization, Kentucky R.E.C.C."

"I happen to be a director on the Board of Directors of Kentucky R.E.C.C., and I feel that it would be to the interest of the distribution cooperatives not to purchase any transformer directly from you in lieu of your attitude toward our own organization, Kentucky R.E.C.C."

"In other words, you are slapping the distribution cooperatives in the face when you refuse to do business with their own association, Kentucky R.E.C.C., and I, as one director, will not be in favor of continuing the splendid relationship with Moloney people that has existed in the past."

In any event, it is clear that as a matter of law the *buyer's* own broker cannot perform the function of "selling the buyer" and, for such alleged service, be paid brokerage or a sales commission by the *seller*. And that is precisely what Ky. RECC in this case is claiming it has the right to do.

So far as the character of the payment is concerned, it is crystal clear that Ky. RECC is talking about a full distributor's or dealer's commission. In its Petition before this Court (p. 7), Ky. RECC describes the payment it says it can lawfully receive as "a normal distributor's commission." During the period 1949 to

late 1955, this commission was in terms of a percentage which increased from 7½% to 10% and was the same commission Moloney paid to ordinary distributors.[1] The compensation was described in Ky. RECC's Sixth Circuit Brief (p. 19) as a "dealer's commission," and Ky. RECC's Manager disclosed his view of the matter when he repeatedly referred to it as "our sales commission."[2] The Manager's complaint, after the payments were halted, also is revealing. He lamented:[3]

> "We couldn't buy them at the same price that a distributor somewhere else could."

When the element of compensation, as thus contended for by Ky. RECC, is added to the question phrased by Ky. RECC as quoted on page 18 above, Ky. RECC's position in the matter—stated entirely in its own words—is as follows:

> "The question then arises as to whether or not it is legally possible for Ky. RECC to act in such transactions as these as a manufacturer's dealer, 'competing in the open market' for the business of its own members, and receiving from Moloney, for this service of 'selling' Moloney equipment to Ky. RECC's own members, a full distributor's or dealer's commission."

If § 2(c) means anything at all, the answer to the question must be a clear-cut "No." And the Circuit Courts have uniformly so held.

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[1] R 4, 58, 61-2.
[2] R 8, 28.
[3] R 79.

In virtually every one of the decisions under § 2(c), the broker urged that it in fact had rendered services to the seller which justified the seller's paying a commission to the broker, even though the broker was acting for the buyer or was subject to control by the buyer. The services which the brokers argued they had rendered were precisely the services which Ky. RECC says it rendered to Moloney. The "service" most often noted was that the broker's operations put the seller's products before the buyer and thus made it unnecessary for the seller to pay a commission to any other salesman or broker. Also, warehousing, general promotion, etc., were cited. In the decisions, the Courts acknowledged that these services undoubtedly were performed and, further, that they undoubtedly were of substantial benefit to the sellers. The Courts particularly recognized that the sellers were spared the expense of the "selling function" performed by these brokers.

In every instance, however, after conceding all of the foregoing to be true, the Courts held that as a matter of law these brokers, representing or under the control of the buyers, could not render services so as to entitle them to receive commissions from the sellers. Certainly with respect to payment of a distributor's or dealer's commission for performance of a selling service, the Courts have unanimously construed the phrase in § 2(c), "except for services rendered," to relate *only* to payment for selling services rendered to the seller by his own agent, and as a matter of law *not* to authorize payment by a seller for selling serv-

ices allegedly performed by the buyer or by an intermediary which is controlled by or is the agent of the buyer.

This particular point is discussed at length and completely disposed of in the *A. & P., Webb-Crawford, Quality Bakers* and *Modern Marketing* cases.[1]

In the *A. & P.* case, the Third Circuit stated the following:[2]

> "The petitioner takes the position that its field buying agents may act properly both as agents for the petitioner and for those that sell to it; that is to say, may serve both as the agents of the vendee and the vendors. The question presented, however, is not one of propriety of agents serving in dual capacity. Such a course was not prohibited by the common law if the status of the dual agency was disclosed fully. The question presented for our consideration is simply whether or not the vendee may be compensated for services rendered by the vendee's agent acting as agent for the vendors. It is obvious that dual representation by agents opens a wide field for fraud and oppression. Conflicting interests are always engaged when an attempt is made by buyers and sellers to arrive at a market price for commodities. We entertain no doubt that it was the intention of Congress to prevent dual representation by agents purporting to deal on behalf of both buyer and seller. For this reason paragraph (c) is framed by disjunctives. The edge of the paragraph cuts two ways, prohibit-

[1] *Great Atlantic & Pac. Tea Co.* v. *F.T.C.*, 106 F.2d 667; *Webb-Crawford Co.* v. *F.T.C.*, 109 F.2d 268; *Quality Bakers of America* v. *F.T.C.*, 114 F.2d 393; *Modern Marketing Service, Inc.* v. *F.T.C.*, 149 F.2d 970.

[2] 106 F.2d at 674-5.

ing the payment or receipt of commissions, discounts or brokerage to the adversary party by the other's agent. **The phrase 'except for services rendered' is employed by Congress to indicate that if there be compensation to an agent it must be for bona fide brokerage, viz., for actual services rendered to his principal by the agent. The agent cannot serve two masters, simultaneously rendering services in an arm's length transaction to both. While the phrase, 'for services rendered', does not prohibit payment by the seller to his broker for bona fide brokerage services, it requires that such service be rendered by the broker to the person who has engaged him. In short, a buying and selling service cannot be combined in one person.**

"* * * The record clearly requires the conclusion that the field buying agents of the petitioner were the agents of the petitioner and that such services as were rendered by them to sellers were purely incidental to such representative capacity. For such incidental services, the petitioner may not be compensated."

In the *Webb-Crawford* case, the Fifth Circuit commented that to construe the phrase "except for services rendered" to permit a broker, having the described relations with one party, to receive a commission provided he rendered service to the other party would "largely destroy the statute and nullify its plain intent."[1]

In *Quality Bakers,* the First Circuit stated the following:[2]

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[1] 109 F.2d at 270.

[2] 114 F.2d at 398.

> "The petitioners contend that by the language in paragraph (c), above quoted, reading 'except for services rendered in connection with the sale or purchase of goods,' the Congress recognizes that a buyer, or his agent, may perform services for the seller in connection with the transaction for which the seller may pay and the buyer or his agent receive compensation by way of a brokerage fee or commission on the sale. We do not take such a view of the paragraph. The construction contended for makes much of its language meaningless; it does violence to the purpose of the Act and has been explicitly rejected in other circuits. It is plain enough that the paragraph, taken as a whole, is framed to prohibit the payment of brokerage in any guise by one party to the other or the other's agent, **at the same time expressly recognizing and saving the right of either party to pay his own agent for services rendered in connection with the sale or purchase.**"

In *Modern Marketing*, the Court noted that the services performed by the broker (controlled by the buyers) "were genuine and of benefit" to the sellers, but nonetheless held that § 2(c) "has been construed in numerous cases as prohibiting the payment of brokerage commission under such circumstances." After citing *Oliver Bros., A. & P., Quality Bakers* and *Webb-Crawford* on this point, and quoting with approval the language just above quoted from the *A. & P.* case, the Seventh Circuit continued in the *Modern Marketing* case as follows:[1]

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[1] 149 F.2d at 978.

"We agree with the construction that Sec. 2 (c) prohibits the payment for services rendered by a broker who is related to the opposite party in any of the ways designated in the provision. Furthermore, we are of the view that where such relationship exists it is immaterial whether the services rendered the seller were genuine or fictitious and whether they were incidental or otherwise. Even good faith on the part of both the broker and the seller cannot be utilized to escape the condemnation of the provision."

Thus, in these four cases *(A. & P., Webb-Crawford, Quality Bakers* and *Modern Marketing)* four of the Circuit Courts, the Third, Fifth, First and Seventh, were in complete agreement in rejecting the precise argument here advanced by Ky. RECC. In the *Biddle* and *Oliver Bros.* cases, two additional Circuits, the Second and Fourth, had reached the precise conclusion.[1]

When the Courts of Appeal for six of the Circuits have considered this point carefully and at length, and are in complete agreement in the matter, the situation certainly presents something less than the "embarrassing conflict of opinion and authority between the circuit courts of appeal" referred to by this Court in the *Layne & Bowler Corp.* case as necessary to a grant of certiorari. In addition, this Court denied certiorari in three of these cases just cited: *Biddle, A. & P.* and *Webb-Crawford.*

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[1] 96 F.2d 687, 691; 102 F.2d 763, 768.

On this matter of "services rendered," there positively is nothing to distinguish the present case from these six decisions just cited except that, if anything, on the facts—as to the elements of control and agency between buyer and broker and as to the nature of the compensation as a "dealer's commission," "normal distributor's commission" or "sales commission"—the present case is even more clearly one of payment of brokerage to the "dummy broker," at which practice § 2(c) was directly aimed by Congress.

It is recognized that problems may at times arise in reconciling some of the qualifying language in § 2(a) of the Act with the flat prohibitions contained in § 2(c). Section 2(a) authorizes price differentials making only due allowance for differences in costs of sale resulting from differing methods or quantities in which commodities are sold or delivered. At times, there may be problems as to whether a particular cost saving closely related to the selling function will justify a price differential under § 2(a), or whether such price differential really constitutes a payment of brokerage in violation of § 2(c).

Two recent decisions point up ways in which this problem can arise. In the *Henry Broch* case,[1] a broker or sales agent of the seller reduced its commission from the customary 5% to 3%, in order that the seller could reduce its price to the buyer, which reduction was necessary for the sale to be made. This Court concluded that the price reduction based upon this

[1] 363 U. S. 166, 4 L. Ed.2d 1124.

savings in brokerage expense constituted an allowance in lieu of brokerage, in violation of § 2(c). In *Robinson* v. *Stanley Home Products, Inc.*, 272 F.2d 601, the buyer and the seller apparently got together and simply eliminated the expense of the independent broker, the buyer thereafter purchasing directly from the seller at reduced prices. The First Circuit concluded that such price reduction did not constitute an allowance in lieu of brokerage contrary to § 2(c), but should be tested under the cost-saving and anti-discrimination provisions of § 2(a).

While it would be of interest to explore this point as developed in the majority and dissenting opinions of this Court in the *Broch* case and in the opinion of the First Circuit in the *Robinson* case, such discussion would be of only academic interest in the present case.

In the *Broch* and *Robinson* cases, the brokers were independent concerns, not affiliated in any manner with either buyer or seller. In each case, the broker, while it functioned, was the agent only of the *seller* and performed true selling services for the seller.

These cases presented the question of when a change in the *seller's own* method or cost of doing business, relative to the brokerage function, can be passed on to the buyer in the form of a reduced price. That positively is not the problem presented in the present case.

This case presents the question of whether a seller may pay brokerage to a buyer or an agent of the buyer **for brokerage services allegedly performed by the buyer or his agent.** Even though the existence and operations of the buyer's purchasing agent may in fact

result in some saving to the seller, this is a saving which cannot be passed on to the buyer in the form of a payment, either to the buyer or to the buyer's agent, of a commission, brokerage or allowance or discount in lieu thereof.

We will not quote from the *Broch* opinion so recently rendered by this Court, but it is beyond argument that, under the majority opinion of the Court, this question is governed, and the making of the payment prohibited, by § 2(c), and that the cost-saving proviso of § 2(a) has no application. Perhaps even more significant, under even the Separate Opinion of four Justices in the *Broch* case—which opinion is more restrictive as to the application of § 2(c)—this case still would be governed, and the payment of commissions to Ky. RECC is rendered unlawful, by § 2(c). The dissenting Justices were careful to distinguish **(a)** a saving to the seller in the cost of brokerage services performed *by the seller's own broker,* which these four Justices would test under § 2(a), from **(b)** a saving to the seller based on services for the seller claimed to have been performed *by the buyer or his broker,* which all of the Court agree is prohibited by § 2(c) from forming the basis for the payment of a commission or brokerage by seller to buyer or buyer's agent.

This case is of the latter type, as to which the law has been settled since the *Biddle* case was decided in 1938. If the rule were otherwise, § 2(c), as all of the Courts have recognized, would be an absolute nullity.

THIRD POINT.

A GROUP PURCHASING AGENT, COOPERATIVELY OWNED AND CONTROLLED BY A GROUP OF BUYERS, IS NOT EXEMPT FROM THE PROVISIONS OF § 2(c).

Ky. RECC is simply a group purchasing agent for the coops, to the extent, even, that the savings resulting from such purchasing are to be paid to the coops as "patronage dividends." This is all specified in its By-laws.[1]

It would seem too clear for argument that, under § 2(c), such a group purchasing agent cannot lawfully be paid brokerage by a seller. Ky. RECC argues, however, that because this purchasing agent is *cooperatively* owned by a number of buyers, it is somehow exempt from the prohibitions of § 2(c).

Ky. RECC's argument is based in part upon § 4 of the Act (15 U. S. C. § 13b) and in part upon an inaccurate assertion that a contrary result would mean that every cooperative engaged in commerce would be in violation of the statute.

Significantly, Ky. RECC does *not* base its argument on any authority whatever, **for the reason that the Circuit Courts and the Federal Trade Commission have repeatedly and consistently rejected the argument and held that cooperatives are *not* exempt from the provisions of the several subsections of § 2 of the Act.** Upon a petition for certiorari it perhaps

[1] R 104.

would suffice to note simply the uniform authorities, but response will be made also to the arguments advanced by Ky. RECC.

The overall issue is whether cooperatives are exempt from the provisions, not just of § 2(c), but of the several subsections of § 2 of the Act. *American Motor Specialties Co.* v. *F. T. C.*[1] was another group buying case. Seventeen jobbers of automotive parts cooperatively owned a purchasing agent, Metropolitan Automotive Wholesalers Cooperative, Inc. They were charged with a violation of § 2(f), making it unlawful for any person in commerce knowingly to induce or receive a prohibited price discrimination. At the Commission level, in answer to the contention that Metropolitan as a cooperative association was exempt under § 4 from the provisions of § 2(f), the FTC made the following pertinent comment as to the scope of the claim:[2]

> "Respondents also argue that such distribution of rebates is permissible under Section 4 of the Robinson-Patman Act. **In order to accept this argument we must necessarily hold that a cooperative association may with impunity engage in practices forbidden not only by Section 2(f) of the Clayton Act but by that entire section, since there is nothing in Section 4 which would indicate that its provisions are applicable to one subsection of Section 2 to the exclusion of the others.** We do not construe Section 4 as granting such

[1] 278 F.2d 225 (2d Cir.), cert. den., ____ U. S. ____, 5 L. Ed.2d 105.

[2] *Metropolitan Automotive Wholesalers Cooperative, Inc.*, FTC Docket No. 5724, CCH Trade Regulation Reporter ¶ 27,876.

> immunity to cooperative associations and consequently must reject respondents' argument on this point. *Quality Bakers of America* * * *."

Thus, the fundamental issue is whether or not cooperatives may be the beneficiaries of price discriminations otherwise prohibited by § 2(a) of the Act, may receive commissions or brokerage in the circumstances made unlawful by § 2(c), may receive discriminatory payments for services or facilities prohibited by §§ 2(d) and 2 (e) and may induce or receive price discriminations contrary to the provisions of § 2(f). There is no basis whatever for an affirmative answer to any of these questions.

The Applicable Statute.

Section 4 of the Act, the coop section (15 U. S. C. § 13b), is as follows:

> "Nothing in sections 13-13b [§§ 2-4 of the Act] and 21a of this title shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association."

Ky. RECC would completely rewrite this narrow provision of § 4 into an exemption of cooperatives from all of the provisions of the Clayton Act as amended by the Robinson-Patman Act. There is absolutely no basis for giving any such effect to § 4.

Had Congress intended that the various anti-trust and price discrimination statutes not apply in any way to cooperatives, it would have been a simple matter for Congress to have so provided. Specifically, had Congress intended to exempt coops from the provisions of § 2(c), an appropriate provision could have been added to § 2(c), or § 4 could have been enlarged to direct that nothing in the Act should prevent a cooperative from receiving commissions from a seller in connection with sales to the coop's members. Congress did not say any of these things anywhere in the Act.

Section 4 is narrowly confined in scope. It deals only with the single act of a coop in returning its profits to its members; the Section provides only that such act is not prohibited by the other sections.

This limited effect of § 4 is clearly stated in House Committee Report No. 2287, as quoted upon Page 20 of Ky. RECC's Petition. Thus it is stated in the Report that § 4

> "* * * affirms the right of cooperatives to distribute their net earnings resulting from their trading operations among their members on a patronage basis in proportion to their purchases or sales from, to, or through such cooperative association."

The Congressional hearings in connection with § 4 otherwise shed light upon the reason for its enactment.

Section 2(a) makes it unlawful for a seller to discriminate in price between different purchasers.

Cooperatives typically sell to other than their members. At the end of a fiscal period, however, a coop returns all or part of its profits only to its members. This act of returning profits to its members, but not to its other customers, might initially be considered to constitute a discriminatory rebate or price discrimination in favor of the member purchasers.

As Congressman Utterback stated, § 4 was added to the Bill

> "* * * in the fullness of caution to protect the distribution of cooperative earnings or surplus among their members on a patronage basis."[1]

In *American Motor Specialties,* the Second Circuit recognized this limited scope of § 4 in the following language:[2]

> "It only protects a cooperative association from charges of violating the Act premised upon the association's method of distributing earnings."

In the present case, the Sixth Circuit reached the identical conclusion as to the purpose and effect of § 4, in the following language:[3]

> "* * * this protection [of cooperatives by § 4] was specifically limited to the provision that a co-operative would not be in violation of the Act merely because of its structure as a co-operative with the distribution of its co-operative earnings among its members on a patronage basis. Under

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[1]Congressional Record, June 15, 1936, 9419.
[2]278 F.2d at 229.
[3]282 F.2d at 485.

Section 4 such a distribution does not in and of itself constitute a violation of the Act, even though the act of returning profits to its members might technically be considered as constituting a discriminatory rebate or price discrimination in favor of its member purchasers and against its non-member purchasers. But that is as far as the exemption goes. * * * Section 4 deals only with the single act of a co-operative returning its profits to its members."

In *Maryland and Virginia Milk Producers Association, Inc.* v. *United States,* 362 U. S. 458, 4 L. Ed.2d 880, this Court dealt with a closely related question. The contention was made that § 6 of the Clayton Act and §§ 1 and 2 of the Capper-Volstead Act completely exempted cooperatives and immunized them from all of the antitrust laws. This Court rejected the contention in the following language:[1]

"The language shows no more than a purpose to allow farmers to act together in cooperative associations without the associations as such being 'held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws,' as they otherwise might have been. This interpretation is supported by the House and Senate Committee Reports on the bill. Thus, the full effect of § 6 is that a group of farmers acting together as a single entity in an association cannot be restrained 'from lawfully carrying out *the legitimate objects* thereof' (emphasis supplied), but the section cannot support the conten-

[1]362 U. S. at 465, 5 L. Ed.2d at 887. The emphasis is the Court's.

> tion that it gives such an entity full freedom to engage in predatory trade practices at will."

The conclusion is the same as that reached by all of the Circuit Courts with respect to § 4.

While § 4 protects cooperatives in distributing their earnings to their members, the earnings nonetheless must be legally acquired, like the earnings of any other concern.

Except for the single protection in returning profits to their members, cooperatives are extended no special dispensations or exemptions under the Act. They must conform to the provisions of the Act just as any other business organization engaged in commerce. Again as stated by Congressman Utterback,

> "There is nothing in the last section of the bill that distinguishes cooperatives, either favorably or unfavorably, from other agencies in the streams of production and trade, so far as concerns their dealings with others."

There is no basis whatever in either the language or the legislative history of § 4 for a conclusion that it exempts cooperatively-owned purchasing agents from the provisions of § 2(c).

The Authorities.

As noted, Ky. RECC does not cite a single authority for its argument that cooperatives should be held exempt from § 2(c)—*for the reason that the authorities are uniformly to the contrary.*

In the *Quality Bakers* case, 114 F.2d 393, the First Circuit had the question squarely presented. The "broker" was a group purchasing agent, precisely like Ky. RECC, cooperatively owned by seventy wholesale baking concerns. It purchased commodities for its members from some 200 sellers and received commissions on the transactions from the sellers. One-half of the commissions was credited to the individual purchasing member, and the other one-half was applied as determined by the Board of Directors. Here was a cooperatively-owned group purchasing agent, subject to the control of its member-buyers and acting as agent for them, just exactly as Ky. RECC is controlled by and acts for its members. The First Circuit held that the "broker" was prohibited by § 2(c) from receiving commissions from the sellers.

In its present Petition, Ky. RECC attempts to convey a false impression of the basis for the First Circuit's decision in the *Quality Bakers* case. Thus, the Petition (p. 13) contains the following statement with respect to the case:

> "The court said that the Quality Bakers Association '. : . is not a cooperative association within the meaning of section 4 of the Robinson-Patman Act, 15 U.S.C.A. §13(b) . . .'"

Not only is that statement *not* in the opinion, but the First Circuit flatly *rejected* any such consideration as a basis for its decision.

In framing the statement in its Petition, Ky. RECC has lifted words out of a sentence in the opinion and

given them a new subject, composing a new sentence which misrepresents the facts as to the decision. The words which Ky. RECC has quoted in the statement in its Petition are contained, in the opinion, in a long paragraph in which the First Circuit was stating, *not* its own conclusions in the matter, but the "substance" of the conclusions which the FTC had reached. Later in the opinion, the First Circuit expressly rejected, as a basis for its decision, any notion that Quality Bakers was not a cooperative within the meaning of § 4. The Court clearly stated the basis for its decision in the following language:[1]

> "The petitioners contend that both the unincorporated association, Quality Bakers of America and the corporation, Quality Bakers of America, Inc., are cooperative associations within the meaning of the above-quoted section of the statute and have supported their contention with argument, both before the Commission and in [t]his court, but *we deem it not necessary to consider whether either or both of the organizations mentioned are cooperatives within the meaning of the statute* **because we hold that Section 4 does not authorize cooperative associations to engage in the practices forbidden by Section 2(c) of the Act, nor except them from its provisions. There is nothing in the language of the statute which warrants such a conclusion or such a forced construction.** The action and debates in Congress to which we have been referred so indicate. Cong. R. Vol. 80, page 8452. See also page 9561.

[1] 114 F.2d at 399-400.

"Paragraph (c) is a distinct and complete provision in itself making illegal the giving or taking of commissions or their equivalent under the circumstances mentioned in the text. There are also in the Act other provisions making other practices illegal as unfair trade practices, but, as it was put by the court in the Oliver case [102 F.2d 767]:

" 'No reason suggests itself why the limitations and provisions relating to one should be read into those relating to the other.'

"There are no provisions in Section 4 exempting cooperative associations from the penalties imposed for violation of Section 2(c)."

The *Modern Marketing* case[1] is another in which a number of buyers, through stock ownership, owned and controlled the brokers involved, the brokers being purchasing agents for their stockholders precisely as Ky. RECC acts for the coops. The commissions which the sellers paid to the brokers were not paid directly to the buyers but were passed on to the buyers in the form of services performed for them by the brokers. The Seventh Circuit held the brokers' receipt of commissions on sales to their buyer-owners unlawful under § 2(c).

The facts and the holding in the *Independent Grocers* case[2] were the same.

In the *American Motor Specialties* case, already cited, the Second Circuit reached the same conclusion, that cooperatives are not exempt from the various provisions of § 2 of the Act, in the following language:[3]

[1] 149 F.2d 970.
[2] 203 F.2d 941.
[3] 278 F.2d at 229.

"Fourth, petitioners contend that because the successor corporate buying group, Metropolitan Automotive Wholesalers Cooperative, Inc., was organized under the Cooperative Corporations Law of the State of New York, it was entitled to the protection of Section 4 of the Robinson-Patman Act, 15 U.S.C.A. § 13b. *Quality Bakers of America* v. *F. T. C.*, * * * holds that Section 4 does not authorize cooperatives to accept brokerage fees forbidden by Section 2(c) even though these fees are passed on to the members. Section 4 states that nothing in the Robinson-Patman Act shall prevent a cooperative association from returning to its members, producers, or consumers any part of the association's earnings. Section 4 does not confer upon cooperative associations any blanket exemption from the Robinson-Patman Act. It only protects a cooperative association from charges of violating the Act premised upon the association's method of distributing earnings. See *Farmers Cooperative Co.* v. *Birmingham*, D.C.N.D.Iowa 1949, 86 F. Supp. 201, 230. The fact that earnings which result from illegal activity may be distributed to the association's members does not insulate the association from prosecution for the illegal activity. Clearly Section 4 does not permit a cooperative to violate Section 2(f) even though its savings through receipt of discriminatory prices are passed on to its members."

This Court denied certiorari.[1]

Another related case, involving a similar cooperatively-owned purchasing agent in the automotive parts

[1] ____ U. S. ____, 5 L. Ed.2d 105.

business, was *Mid-South Distributors.*[1] Again, the charge was a violation of § 2(f). The Commission rejected the defense that Mid-South, as a cooperative association, was exempt under § 4 from the provisions of § 2(f), as follows:

> "Respondents further contend on this appeal that Mid-South Distributors and Cotton States, Incorporated, are cooperative associations, and, therefore, not prohibited from returning to their members the net earnings or surplus resulting from their trading operations, in proportion to purchases of the members of the association, citing Section 4 of the Robinson-Patman Act (49 Stat. 1528). It is our opinion that the reasoning of the court in *Quality Bakers* * * * on this point in a Section 2(c) matter is equally applicable to a Section 2(f) matter. In other words, **Section 4 does not authorize cooperative associations to engage in practices forbidden by Section 2(f), nor except them from its provisions.**"

Since its decision in *Quality Bakers* was affirmed by the First Circuit, the Commission has consistently held that cooperatively-owned purchasing agents are prohibited by § 2(c) from receiving from a seller commissions on sales to their members.

For example, in *Druggists' Supply Corp.*,[2] more than 100 wholesale druggists were the sole stockholders of their own purchasing agent which effected sales of merchandise to the member stockholders, received com-

[1]FTC Docket Nos. 5766 and 5767, CCH Trade Regulation Reporter ¶ 27,846.

[2]FTC Docket No. 6420.

missions from sellers and passed the commissions on to the members. This is precisely Ky. RECC's operation. The druggists consented to a cease and desist order prohibiting them and their purchasing agent from receiving commissions on such sales. In *Clover Farm Stores Corp.*,[1] the situation was much the same. A number of wholesale concerns as stockholders owned a company which acted as purchasing agent, received commissions from food product manufacturers on sales made to its stockholders and passed the commissions on to the stockholders in the form of patronage dividends. Again, a consent cease and desist order was entered prohibiting the receipt of such commissions on sales to the company's stockholders.

Ky. RECC seeks to avoid the effect of these numerous decisions, that coops are not exempt from the provisions of §. 2 of the Act, by an assertion that the cooperatives in the decided cases were not "real cooperatives" but actually were illegal corporate schemes for the purpose of circumventing the Act.

The only fact which made these other operations "illegal corporate schemes" was that the coops involved were seeking to obtain benefits and advantages made unlawful under § 2. Otherwise, there was nothing "illegal" about the cooperative nature or existence of the intermediary in any of these cases.

For example, the group purchasing agent involved in *American Motor Specialties* was expressly stated to have been organized under the Cooperative Corpora-

[1]FTC Docket No. 6444.

tions Law of New York. In the cases just cited, each of the cooperatively-owned purchasing agents undoubtedly had a lawful creation and existence as a cooperative. Granting their true cooperative characters, however, the Courts and the Commission nonetheless held that they were seeking to obtain benefits and advantages which they could not lawfully receive under the Act.

Ky. RECC is in precisely the same position. It presumably has a legal creation and existence; it undoubtedly lawfully performs some functions for its members. In the one respect here involved, however, it seeks to obtain—just as did the cooperatives in the other decided cases—a benefit or advantage which is made unlawful under the statute. To the extent that Ky. RECC wishes to receive commissions upon sales to its member-owners contrary to the provisions of § 2(c), it is quite as much an "illegal corporate scheme to evade the statute" as any of the other cooperatives in question.

Ky. RECC suggests that Quality Bakers "was not a coop within the meaning of § 4." If Quality Bakers was not a coop within the meaning of § 4, then neither is Ky. RECC. The facts as to their cooperative natures and their operations as purchasing agents for their member-owners are absolutely identical in every respect.

Ky. RECC infers that some of these other cooperatives had as their principal purpose the obtaining of benefits made unlawful by the Act. The principal purpose for the creation of Ky. RECC unquestionably

was to obtain, from manufacturers of electrical equipment, commissions upon purchases of such equipment by the coops. A major subject dealt with in the By-laws is how Ky. RECC would "purchase materials, supplies and equipment for its members" and the manner in which "savings resulting from such purchasing" would be paid to the members. The distribution coops as purchasers are prohibited by § 2(c) from demanding brokerage or commissions from sellers. Through the medium of their cooperatively-owned purchasing agent, Ky. RECC, they seek to obtain these same forbidden commissions or brokerage upon their purchases.

If the cooperative purchasing agents in *American Motor Specialties* and *Mid-South Distributors* were illegal corporate schemes for the purpose of obtaining prohibited price discriminations, and if the similar agents in *Quality Bakers, Modern Marketing, Independent Grocers, Druggists' Supply Corp.* and *Clover Farm Stores* were illegal corporate schemes for the purpose of obtaining forbidden brokerage, in identical manner Ky. RECC also is an illegal corporate scheme for the purpose of obtaining such forbidden brokerage.

It is not believed that there is a single decision or authority of any kind upholding the payment by sellers of commissions to a cooperative purchasing agent upon sales to the owners or members of the agent—certainly, Ky. RECC has not been able to cite any such decision or other support for its position.

The Logic of the Matter.

Entirely apart from these authorities, it is apparent that to exempt cooperatively-owned buying agencies from § 2(c) would immediately and completely destroy that section of the Act.

The reasons for the enactment of § 2(c) are clear. Abuse of the brokerage function for purposes of obtaining hidden discriminations was the evil at which the statute was aimed. Large buyers were able to exert coercive influence in obtaining the allowance of brokerage either directly to themselves or to their employees or agents. These considerations are set out in House Report 2287, 74th Congress, 2d Session 1936, the Report noting that "when free of the coercive influence of *mass buying power* discounts in lieu of brokerage are not usually accorded to buyers who deal with the seller direct."

Particularly in light of these considerations, Ky. RECC's position is completely untenable. It argues that by forming a cooperative purchasing agency its members should be permitted to obtain from a seller, upon their own purchases, precisely the kind of dealer's commission they cannot obtain directly.

Under the principle contended for by Ky. RECC, a single large buyer possessing "mass buying power" could *not* force the payment of brokerage to itself or its agent, but a group of buyers, achieving mass buying power by combining their demands, would be permitted to collect such brokerage. There would be no logic at all in prohibiting mass buying power when centered

in one buyer from forcing the payment of brokerage, and then permitting a group of buyers to do the same thing by acting through a cooperatively-owned agent. The "coercive influence of mass buying power," and the resulting "abuse of the brokerage function for purposes of oppressive discrimination," are just as undesirable and damaging to free competition in commerce no matter how the mass buying power is created.

No valid distinction exists with respect to the character of the large buyer—whether a single concern or a cooperative. The determining factor is the character of payment or benefit sought to be obtained. Where the payment or benefit which the buyer seeks to obtain is one prohibited by the statute, as is the collection of commissions or brokerage under the circumstances made unlawful in § 2(c), the single large concern and the cooperative agency are alike precluded from obtaining it.

There cannot be any suggestion that small concerns should be allowed to collect brokerage through cooperative purchasing, in order for them to combat the power of mass buying by their larger competitors. First, their larger competitors are prevented by § 2(c) from collecting brokerage. To allow coop members to do so would not merely place them on an equal footing; it would give them an *advantage*. Second, to permit cooperatively-owned purchasing agencies to force the payment of brokerage would, in the final analysis, benefit the large buyer far more than it would benefit the smaller competitor. The flood gates would be down on the collection of brokerage. If small buyers could

lawfully form a cooperative and exert some coercive influence to obtain brokerage, then large buyers could do the same. And the influence which could be exerted by a combination of large buyers obviously would be far greater and would result in the allowance to them of even larger brokerage and commissions.

If Ky. RECC's member coops were able, through the medium of Ky, RECC, to obtain a "distributor's commission" on their own purchases, then any other group of buyers—the baking concerns in *Quality Bakers,* the grocers in *Modern Marketing* and *Independent Grocers,* the automotive parts jobbers in *American Motor Specialties* and *Mid-South Distributors,* the druggists in *Druggists' Supply Corp.*—could do the same thing. Section 2(c) would be out the window, and the evils it was designed to prevent would be back in.

Ky. RECC argues that a holding that cooperative purchasing agencies are not exempt from § 2(c) means that all cooperatives are in violation of § 2(c). The argument is patently unsound.

The fundamental error in Ky. RECC's reasoning is a failure to distinguish between those benefits which a cooperative lawfully may obtain for its members and those forbidden by law. Entirely outside the realm of Robinson-Patman Act considerations, there are a great many savings and benefits to be derived through cooperative action, none of which is in any way jeopardized by the holding of the Sixth Circuit in this case. For example, Ky. RECC says that it publishes

a magazine, conducts safety and job training programs for its members, has a transformer and other repair shops, does printing and central billing, and performs other services for its members. None of these activities is in any way affected by the decision.

Even in the realm of mass buying or group purchasing, there are a great many benefits which a cooperatively-owned group purchasing agent can properly obtain for its members.

While § 2(a) contains the basic prohibition against price discriminations, it contains the important qualification that it does not prevent "differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." Under this proviso, price differentials traceable to such differences in cost may lawfully be received by a buyer, whether the buyer be a single nation-wide chain or a purchasing agent cooperatively owned by a number of otherwise independent concerns.

Illustrations of justifiable price differentials based upon such cost differences, and pertinent to the cooperative buying agency question, are differences in the cost of packaging or crating resulting from shipment in different quantities, differences in delivery costs as between purchasers requiring delivery in small quantities at multiple locations and those taking large-quantity single-point delivery resulting in savings in trucking and other such costs, differences in cost of shipment by different methods or carriers due to dif-

ferent locations of purchasers, different quantities shipped, and the like. If a number of independent buyers, by purchasing through a cooperatively-owned agency, can effect such savings in costs to the seller, they may lawfully receive the benefits of these savings in the form of price differentials, but not in excess of the cost savings. Again, the same is true of a single large purchaser, there being no distinction made in the Act as between a cooperative purchasing agent and any other large or small buyer.

As this Court held in the *Henry Broch* case, however, in § 2(c) Congress dealt specifically with the matter of brokerage and outlawed its payment in the specified instances. Again, no distinction is made between a cooperative purchasing agent and any other large or small buyer. If a saving in the brokerage function justified a price differential where cooperative purchasing was involved, it would have the same effect where there was a single large buyer. Abuse of the brokerage function—this particular "coercive influence of mass buying power"—would again be prominently present. There would be nothing left of § 2(c).

There are many benefits which a cooperative lawfully may obtain and pass on to its members. The death knell for cooperatives is not sounded by a holding that there are a few which they cannot. Section 2(c) decrees that one benefit a cooperative, like any other controlled intermediary or agent, cannot lawfully obtain is the payment of commissions upon sales to its members.

If the desirable and undesirable consequences of alternative decisions of the question were to be weighed —really a Congressional prerogative—there is nothing at all undesirable in denying to cooperatives and their members the competitive advantage of receiving commissions upon sales to the members, while a contrary ruling would completely destroy the beneficial effects of § 2(c) on free competition and inevitably result in a return, through the cooperative device, to the evils which § 2(c) now is preventing.

FOURTH POINT.

IT IS NOT NECESSARY TO A VIOLATION OF § 2(c) THAT THE PAYMENT OF BROKERAGE BE SHOWN IN THE PARTICULAR CASE TO HAVE LESSENED COMPETITION OR TENDED TO CREATE A MONOPOLY.

In the second Question stated in its Petition (p. 2) and elsewhere in the Petition (pp. 19-20), Ky. RECC urges that a payment of brokerage, although contrary to the express prohibitions of § 2(c), nonetheless should not be held in violation of § 2(c) unless the payment is shown in the particular case to have tended to restrain trade, lessen competition or create monopoly. The premise, that payments of brokerage to Ky. RECC on sales to the coops do not have such tendency, is erroneous but is equally immaterial.

It is clearly established that § 2(c) is wholly independent in creating a separate offense, and it is not necessary to a violation of § 2(c) that the payment of the commission is shown to have resulted in the particular case in any lessening of competition or tendency to monopoly.

In *F. T. C.* v. *Simplicity Pattern Co.*, 360 U. S. 55, 3 L. Ed.2d 1079, a violation of § 2(e), rather than § 2(c), was found. In considering § 2(e), however, this Court discussed all of the sub-sections of § 2. With respect to §§ 2(c), 2(d) and 2(e), the Court stated the following (p. 65):

"In terms, the proscriptions of these three subsections are absolute. Unlike § 2(a), none of them requires, as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition."

In a number of decisions, the Circuit Courts have recognized that Congress determined that the making of the payments described in § 2(c), without more, constituted an undesirable practice which Congress intended to eliminate. Thus, in the *Webb-Crawford* case, the Fifth Circuit stated the following:[1]

"While subsection (a) of Section 2 of the Clayton Act as amended, 15 U.S.C.A. § 13(a), makes necessary a finding that the discrimination therein condemned affects competition or tends to create monopoly, subsection (c) mentions no such element. Subsection (a) begins: 'It shall be unlawful for any person engaged in commerce, in the course of such commerce', to do certain things. Subsection (c) begins with the same words, thus taking a fresh start and by an entirely independent paragraph and without any such qualification condemns other things. **The Congress considered the effect on commerce of the things named in subsection (c), and absolutely prohibited them. The Trade Commission is not to enter on any enquiry about their evil effect,** nor whether a proceeding would be in the public interest. Its duty is to enforce the prohibition."

[1]109 F.2d at 269.

Similarly in the *Biddle* case,[1] the broker argued that §§ 2(a) and 2(c) should be construed together to the extent that a payment to the broker should be held in violation of § 2(c) only when it was shown to have a tendency to lessen competition. The Second Circuit recognized that Congress had considered the "evils inherent in the payment of brokerage fees by the seller to the buyer directly or through an intermediary" and, in § 2(c), had unqualifiedly outlawed the making of such payments.

In the *Oliver Bros.*[2] and *A. & P.*[3] cases, the Fourth and Third Circuits rejected the same argument that sub-sections (a) and (c) should be construed together by reading into § 2(c) the limitation-of-competition or tendency-to-create-monopoly requirements of § 2 (a). Section 2(c) was held to absolutely prohibit the payment of brokerage in the described situations. In the *Oliver Bros.* case, after stating that "three specific matters were forbidden as unfair trade practices by subsections (c), (d) and (e)," the Court stated the following (p. 767):

> "It is perfectly clear that all three of these practices were forbidden because of their tendency to lessen competition and create monopoly, **without regard to their effect in a particular case**; and there is no reason to read into the sections forbidding them the limitations contained in section 2(a) having relation to price discrimination, which is an extremely difficult matter to deal with and

[1] 196 F.2d 687.
[2] 102 F.2d 763.
[3] 106 F.2d 667.

is condemned as unfair only in those cases where it has an effect in suppressing competition or in tending to create monopoly. The forbidding of specific practices because of their tendency toward a general result, also forbidden, is familiar legislative practice; and no reason suggests itself why the limitations and provisions relating to one should be read into those relating to the other."

The opinion in the *A. & P.* case contains the following statements (pp. 677, 678):

"In other words, paragraph (c) constitutes a specific prohibition of a specific act and the acts committed by the petitioner are within such prohibition. To read the words of paragraph (a) into paragraph (c) destroys the Congressional intent."

"Moreover, Congress is not required to limit the exercise of its power under the Commerce Clause upon the effect of forbidden acts in particular instances. It may proceed generally for the protection of commerce in general, expressing its disfavor of certain acts as hurtful to competition in such terms as it sees fit so long as it does not transgress the boundaries imposed by the Constitution. * * *

"The practice of paying brokerage, or sums in lieu of brokerage, to buyers or their agents by sellers was found by Congress to be an unfair trade practice resulting in damage to commerce. Paragraph (c) prohibits such practice. We conclude that Congress has properly exercised its power to the end that the named abuse may be done away with."

In the *Simplicity Pattern* case, at p. 68, this Court appropriately noted that

> "And, with respect to the absence of competitive injury requirements, it sufficies to say that the antitrust laws are not strangers to the policy of nipping potentially destructive practices before they reach full bloom."

Ky. RECC occupies as to the coops the relationships described in § 2(c)—*i. e.*, Ky. RECC is owned and controlled by the coops and acts as their agent in purchasing materials. That being so, the payment of commissions to Ky. RECC upon sales to the coops is forbidden by § 2(c); and it is not necessary to such conclusion that it be shown that the making of such payments would lessen competition or tend to create monopoly.

CONCLUSION.

It is respectfully submitted that the decision of the Sixth Circuit in this case is completely in accord with the many pertinent decisions by the other Courts of Appeal and is sound in all respects, and that the Petition for Certiorari should be denied.

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February 10, 1961.

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FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 575

KENTUCKY RURAL ELECTRIC COOPERATIVE CORPORATION, Petitioner,

versus

MOLONEY ELECTRIC COMPANY, Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1960

No. 575

KENTUCKY RURAL ELECTRIC COOPERATIVE CORPORATION, - - - - - - *Petitioner,*

v.

MOLONEY ELECTRIC COMPANY, - - *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner prays a rehearing of the order herein denying certiorari and respectfully submits that the writ should be granted because of intervening circumstances of substantial and controlling effect, and because of other substantial grounds now available to petitioner although not previously presented.

REASONS FOR GRANTING REHEARING.

The Petition for Writ of Certiorari was filed the ninth day of December, 1960. Respondent's brief was filed February 10, 1961 and petition was denied February 20, 1961.

On February 13, 1961, subsequent to the filing of the petition and subsequent to the filing of the brief by the Respondent, there was filed in the United States

District Court for the Eastern District of Pennsylvania in Criminal Action No. 20362, a judgment and commitment agaist the Respondent herein, Moloney Electric Company, convicting the Respondent of the offense of violation of the Sherman Act. Said conviction was upon an indictment in the aforesaid Court which alleges in part as follows:

> "Beginning at least as early as 1956, the exact date being to the grand jurors unknown, and continuing thereafter up to and including the date of the return of this indictment, the defendants, together with other persons to the grand jurors unknown, have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in distribution transformers, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' as amended (c. 647, 26 Stat. 209, 15 U.S.C. §1), commonly known as the Sherman Act.
>
> "The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and other persons to the grand jurors unknown, the substantial terms of which have been and are:
>
> (a) To fix and maintain prices, terms and conditions for the sale of distribution transformers; and
>
> (b) To quote to various governmental agencies and other customers only the prices for distribution transformers as agreed upon and fixed."

CONCLUSION.

For the reason that the Petitioner's counsel herein was unable to obtain a copy of the aforesaid judgment and commitment of Respondent until a few days prior to the filing of this petition for rehearing, and for the reason that said conviction clearly demonstrates the type of illegal action taken by Respondent against the Petitioner herein which has resulted in great injury to the Petitioner, and for the reason that said action by the Respondent as evidenced by the conviction was alleged to have taken place in part at approximately the same time that Petitioner herein suffered injury at the hands of the Respondent, and for the reason that Respondent's criminal conviction related to the exact type of electrical equipment involved in the case herein, and for the reason that to deny the Petitioner herein relief in this cause by denial of a writ of certiorari will be in fact to deny relief to a cooperative corporation simply because it is a cooperative where other types of corporations and individuals are normally granted relief, Petitioner respectfully submits that a rehearing should be granted on the order denying certiorari herein and that another order be now entered granting certiorari.

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